Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

PETITIONERS,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held—in conflict with the First, Seventh, and Eighth Circuits—that the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, barred the district from enjoining Respondents' state court action even though it was initiated after Petitioners, fiduciaries of an employee welfare benefit plan, requested injunctive relief in federal court.

2. Whether the Fourth Circuit erred when it held—in conflict with the Second and Sixth Circuits—that Petitioners' request for declaratory and injunctive relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* did not fall within the expressly authorized exceptions to the AIA.

3. Whether the Fourth Circuit erred when it held—in conflict with the Third and Fifth Circuits—that all of the declaratory relief sought by Petitioners, including a declaration that a California statute purportedly regulating Petitioners' employee welfare benefit plan was preempted, constituted "an injunction to stay proceedings in a State court" within the meaning of the AIA.

RULE 29.6 STATEMENT

Petitioner Denny's Inc. is the wholly-owned subsidiary of Denny's Holdings, Inc., which is the wholly-owned subsidiary of Denny's Corp.

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The District Court's opinion (Pet. App. 25a-40a) is published at 247 F. Supp. 2d 813. The Fourth Circuit's opinion (Pet. App. 1a-24a) is published at 364 F.3d 521.

JURISDICTION

The Fourth Circuit denied Petitioners' petition for rehearing or rehearing en banc on May 7, 2004. Pet. App. 44a-45a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 48a-55a) reproduces 28 U.S.C. § 2283 and provisions of 29 U.S.C. § 1001 *et seq.* and the California Labor Code involved in this case.

STATEMENT OF THE CASE

Petitioners, fiduciaries of an employee welfare benefit plan, filed an action in federal court under 29 U.S.C. § 1132(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, seeking (1) a declaration that obligations purportedly imposed on the plan by the California Labor Code are preempted by ERISA; and (2) an injunction prohibiting enforcement of the preempted law. Respondents, the California officials named in the federal court action, filed suit in state court against Petitioners several weeks later, and the state court entered a stay. The United States Court of Appeals for the Fourth Circuit held that Respondents' initiation of a subsequent state court action defeated the exclusive jurisdiction of the federal court to provide any relief under ERISA by operation of the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283. That outcome conflicts with the standards applied in seven other circuits.

Factual and Regulatory Background

1. Denny's Inc. ("Denny's") is a national restaurant chain that employs approximately 30,000 people in thirty-six

states. Denny's established and maintains the Denny's, Inc. Vacation Plan ("the Plan") and the Denny's, Inc. Employee Benefits Trust ("the Trust") to provide vacation benefits to eligible employees. Denny's is the "administrator" and a "fiduciary" of the Plan under ERISA, 29 U.S.C. § 1002(16)(A), (21). The trustee of the Trust, Andrew F. Green, is also a fiduciary of the Plan within the meaning of 29 U.S.C. § 1002(21). The Plan and the Trust are located and administered in South Carolina, where Denny's maintains its principal place of business. *See* Pet. App. 26a.

The Plan provides that salaried employees are not eligible to use vacation days and will not be paid vacation benefits upon termination of their employment until they have completed six months of continuous service with Denny's. Hourly employees must complete one year of continuous service to receive vacation benefits under the Plan. *See id.* Petitioners apply these same terms uniformly to all employees in every state they conduct business, including the 7,587 Denny's workers in California.

2. ERISA imposes numerous obligations on plan fiduciaries like Petitioners, to ensure fair and responsible administration of a qualifying plan. Of particular importance here, a fiduciary must provide benefits "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" ERISA. 29 U.S.C. § 1104(a)(1)(D). ERISA also provides that state laws purporting to govern the terms of an employee benefit plan are completely preempted. *Id.* § 1144(a). Thus, an ERISA fiduciary has an obligation to pay benefits in accordance with the plan even if a state law purports to require different benefits.

Given the potential for conflicting duties under state and federal law, Congress provided ERISA fiduciaries a cause of action to obtain equitable relief to prevent violations of ERISA's preemption provisions and "determine whether

the plan's trustees may comply with a state [law]." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 26-27 (1983); *see also* 29 U.S.C. § 1132(a)(3). Congress provided federal district courts with exclusive jurisdiction over such suits. 29 U.S.C. § 1132(e)(1).

3. California statutes impose state law requirements on vacation benefit plans. California Labor Code § 227.3 provides that when "an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages," and that "an employment contract or employer policy shall not provide forfeiture of vested vacation time upon termination." Consistent with its understanding of its obligations under federal law, Petitioners continued to pay benefits in accordance with the terms of the plan and informed officials of California that they could not pay the benefits required by the California Labor Code.

On July 11, 2001, Petitioners received a letter from a staff attorney under the direction of Respondents Chuck Cake, Acting Director of the California Department of Industrial Relations ("the Department") and Arthur Lujan, Labor Commissioner of the State of California ("the Commissioner"). The letter contended that Petitioners' vacation plan policies violated California Labor Code § 227.3. The Department's attorney asserted that the Plan and the Trust are not covered by ERISA and thus can be subject to California law. The letter indicated that the Department would file an action against Petitioners to subject the Plan and the Trust to California law if Petitioners did not honor the State's demands. Pet. App. 26a-27a.

Proceedings In The District Court

1. As the Court of Appeals recognized, Petitioners faced a "Hobson's choice." Pet. App. 11a. To comply with California's demands, Petitioners would have had to pay

benefits to more than 7,500 employees in contravention of the terms of the plan. Petitioners therefore could "obey the state law, and risk violating the provisions of the plan or ... 'risk[] breaking the [state] law.'" *Id.* (citation omitted) (first alteration in original). Petitioners elected to seek clarification of their obligations as plan fiduciaries through the procedures afforded by Congress.

On September 6, 2002, Petitioners brought suit for declaratory and injunctive relief in the United States District Court for the District of South Carolina, the jurisdiction where the plan is administered. *See* 29 U.S.C. § 1132(e)(2). The complaint requested (1) a declaration that the Plan and Trust constitute an "employee welfare benefit plan" under ERISA; (2) a declaration that "ERISA preempts California statutes, regulations" as well as "any action or decision" of the Commissioner "having the effect of law that [the Commissioner] seek[s] to enforce against [Petitioners] based upon California law"; and (3) preliminary and permanent injunctions "barring [the Commissioner] from taking any action to enforce California law against [Petitioners] with regard to the Plan and the Trust." Pet App. 3a-4a. Petitioners could not have filed this action in state court; Congress established exclusive federal jurisdiction for these claims. 29 U.S.C. § 1132(e).

2. Respondents nevertheless filed suit against Petitioners in California state court on September 24, 2002, nearly three weeks later. The Commissioner asked the state court to award damages for unpaid vacation wages and waiting time penalties under California Labor Code § 203 and to order Petitioners to "cease and desist from violating" California Labor Code § 227.3. If granted, that relief would require Petitioners to follow California's incompatible vacation benefit regulations, preventing them from complying with ERISA's mandate to administer their plan in accordance with its terms. *See* 29 U.S.C. § 1104(a)(1)(D);

Pet. App. 26a ("California Labor Code Section 227.3 is in conflict with the Plan's vacation policy.").

In their answer, Petitioners raised ERISA preemption as an affirmative defense. Pet. App. 4a. On Petitioners' motion, and over Respondents' objection, the state court issued a stay "pending resolution" of the previously filed action in federal court. *Id.* at 42a.

Respondents then moved to dismiss Petitioners' federal action. The Commissioner claimed that the district court lacked personal jurisdiction, despite ERISA's nationwide service of process provision, 29 U.S.C. § 1132(e)(2). It also argued that the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, and the *Younger* abstention doctrine compelled dismissal of the complaint.

3. Without reaching the AIA or *Younger* abstention claims, the district court granted the motion to dismiss for lack of personal jurisdiction. The court reasoned that personal jurisdiction conferred by Section 1132(e)(2) could only be satisfied if the claims "fall within ERISA's civil enforcement provision" under Section 1132(a)(3). Pet. App. 29a. Because the district court believed that Section 1132(a)(3) could not be used to enforce ERISA's preemption provision (29 U.S.C. § 1144), Pet. App. 30a, it held that there was no claim under Section 1132(a)(3) and thus no personal jurisdiction under ERISA's nationwide service of process provision. *Id.* at 36a-39a. Respondents immediately filed an application to lift the state court's stay of proceedings. The state court denied the request.

Proceedings In The Court Of Appeals

The Fourth Circuit reversed the district court's dismissal of the complaint for lack of personal jurisdiction. Pet. App. 11a. It nevertheless concluded that Petitioners' request for declaratory and injunctive relief was barred by the AIA and remanded "with instructions to enter an order

dismissing the case for failure to state a claim upon which relief can be granted." *Id.* at 17a-18a.

1. Addressing personal jurisdiction, the Fourth Circuit held that ERISA's civil enforcement provision authorizes actions to enforce all sections of Title I of ERISA, which "clearly contains ERISA's preemption provision." Pet. App. 6a. The Fourth Circuit also noted that this Court has "expressly stated that '[u]nder [Section 1132(a)(3)(B)], a participant, beneficiary or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court to determine whether the plan's trustees may comply with a state [law].'" *Id.* (quoting *Franchise Tax Bd.*, 463 U.S. at 26-27) (first and third alterations in original). Because Petitioners' "action to enforce § 1144 falls within § 1132(a)(3)," the Fourth Circuit vacated the district court's judgment dismissing this case for lack of personal jurisdiction. *Id.* at 11a.

2. The Court of Appeals nevertheless affirmed the dismissal of the complaint based on the Commissioner's alternative argument that the AIA prohibits a federal court from granting the declaratory and injunctive relief requested in Petitioners' complaint.

First, the Fourth Circuit held that Section 2283 applies to the state proceedings at issue here even though they were initiated after Petitioners filed this action in federal court seeking injunctive and declaratory relief. Pet. App. 17a-18a (holding that "the [AIA]'s prohibition on enjoining state court proceedings applies to any such proceeding pending at the time the federal court *acts* on the request for injunctive relief, regardless of when the state court action was filed"). The Court of Appeals specifically rejected the contrary position—that Section 2283 does not apply to such later-filed state actions—adopted by the First, Seventh, and Eighth Circuits. *Id.* at 14a-18a.

Second, based on its prior decision in *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995) ("*ERM*"), *cert. denied*, 516 U.S. 1094 (1996), the Fourth Circuit held categorically that ERISA "expressly authoriz[e]" an exception to Section 2283 in this (or any other) ERISA action. Explicitly "recognizing a 'circuit split' on the question," the Fourth Circuit squarely rejected the holding in the Second and Sixth Circuits that ERISA expressly authorizes an exception to Section 2283. *Id.*

Third, the Fourth Circuit held that Section 2283 reaches all the *declaratory* relief at issue here. Although the literal wording of the AIA prohibits only "an injunction to stay" state court proceedings, the court reasoned that "when the Act bars an injunction it 'also bar[s] the issuance of a declaratory judgment that would have the same effect as an injunction.'" Pet. App. 12a n.8 (quoting *Tex. Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989)) (alteration in original). It then held that the declaratory relief sought in this case—including Petitioners' limited request for a declaration that the California statute is preempted—would have the same "effect" as an injunction, apparently based upon its potential for collateral estoppel effects. The court therefore concluded that the AIA "rendered the district court powerless to issue any of the relief Denny's requested." *Id.* at 18a.

3. In her concurring opinion, Judge Williams agreed with the majority's conclusion regarding personal jurisdiction. She wrote separately to explain that she concurred in the judgment because dismissal of Petitioners' complaint was "compelled by our prior decision in *Employers Resource Management*" and to "highlight some of [her] concerns" about the Court's interpretation of the AIA. Pet. App. 19a.

First, Judge Williams agreed "with many of the concerns expressed by then-Judge Stevens in *Barancik v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir. 1973)" with reading the AIA to bar instructions of later-filed state suits, "especially the fear that our holding will pressure federal courts to grant temporary restraining orders." Pet. App. 19a. She also noted that "the facts of this case suggest a particularly troubling scenario" because the applicability of the AIA could have "hing[ed] entirely on the fortuity of the district court's erroneous procedural ruling." *Id.* at 19a n.*. Had the district court correctly found personal jurisdiction and ruled promptly on Petitioners' request for equitable relief, it might properly have enjoined initiation of the state suit. *Id.* at 19a. She nevertheless joined the majority's view that the AIA applies to later-filed state court proceedings. *Id.*

Second, addressing the "expressly authorized" exception to the AIA, Judge Williams stated that "[w]ere we writing on a clean slate, I might conclude that ERISA should be an exception to the AIA in all cases where the plan fiduciary seeks injunctive relief against state officials who are trying to impose state law or regulations on an ERISA plan." Pet. App. 21a. She acknowledged that "the AIA likely would not apply in this case" if that interpretation were adopted. *Id.* Judge Williams concluded, however, that this interpretation was "not available" under *ERM*. *Id.*

4. Petitioners filed a request for rehearing and rehearing en banc. The petition was denied on May 7, 2004. Pet. App. 44a-45a. Respondents then requested the state court to lift the stay. The state court denied the motion and the stay remains in effect.

REASONS FOR GRANTING THE WRIT

As Judge Williams emphasized in the opening lines of her concurring opinion, "this case require[d] our court to weigh in on two separate issues related to the Anti-

Injunction act that have divided the Courts of Appeals." Pet. App. 18a. This petition accordingly presents this Court with an exceptional opportunity to resolve persistent conflicts in the Court of Appeals concerning issues of national importance.

First, the circuit courts disagree about whether the AIA applies when the defendant elects to initiate state court proceedings after a federal action seeking injunctive relief has already been filed. More than half the circuit courts have addressed this question but they have failed to reach any form of consensus over the past three decades. This conflict concerning critical issues of federalism is long-standing, entrenched, and well recognized.

Second, the Courts of Appeals disagree about whether, and in what circumstances, ERISA can constitute an "expressly authorized" exception to the AIA. The Fourth Circuit and at least one other circuit hold that ERISA *never* authorizes relief otherwise barred by the AIA. In their view, Congress only intended to permit ERISA fiduciaries to pursue claims for relief within the exclusive jurisdiction of the federal courts until such time as the defendant elects to initiate a state court proceeding seeking to enforce a preempted state law. Two circuits have squarely rejected that view and held that Congress intended to authorize fiduciaries to obtain effective relief from preempted state action—including injunctions to stay state court proceedings—by pursuing claims within the exclusive jurisdiction of the federal courts. This conflict has fragmented ERISA litigation between federal and state courts and undermines the clear mandates of ERISA.

Third, the Courts of Appeals have also adopted divergent standards for defining declaratory relief that falls within the scope of the AIA's prohibitions. Three Courts of Appeals have created and applied three different standards to determine what should be characterized as an

impermissible "injunction to stay proceedings in state court." The differences were outcome-determinative here.

Finally, resolution of these issues is important. The patchwork of rights and remedies created by these conflicts in the circuits undermines the efficient and equitable administration of ERISA plans throughout the nation. Congress sought to ensure that fiduciaries *in every state* would have equal access to federal court remedies to ensure proper administration of their plans. But under the current state of affairs, the fiduciary of a plan administered in South Carolina (and a number of other states) cannot secure injunctive or declaratory relief from the federal court if the defendant decides to initiate an enforcement action in state court at any time before the fiduciary's request for equitable relief has been resolved by the federal court. Thus, fiduciaries who administer their plans in such states can be divested of the federal forum—notwithstanding ERISA's grant of exclusive federal jurisdiction—at the whim of the opposing party. In contrast, fiduciaries who administer their plans in states such as Michigan, Tennessee, and New York are guaranteed an exclusive federal forum for their ERISA claims. This state of the law seriously undermines ERISA's purposes and confuses basic federalism principles. *See, e.g., Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) (noting that the "express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties [including fiduciaries] ... as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes"); *cf. Aetna Health Inc. v. Davila*, Nos. 02-1845, 03-83, 2004 U.S. LEXIS 4571, at *15 (June 21, 2004) (holding that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive").

This Court has repeatedly recognized the importance of resolving issues that impair ERISA's mandate for national uniformity.[1] Review is warranted here.

I. THE FOURTH CIRCUIT'S HOLDING DEEPENS AN EXISTING CIRCUIT CONFLICT OVER WHETHER SECTION 2283 APPLIES TO STATE COURT PROCEEDINGS INITIATED AFTER INJUNCTIVE RELIEF IS SOUGHT IN FEDERAL COURT

It has long been established that the Anti-Injunction Act does not bar injunctions against the initiation of state court proceedings. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). The circuit courts cannot agree, however, whether defendants can defeat this rule by initiating state proceedings while the request for injunctive relief is pending in federal court.

At least four Courts of Appeals, including the court below, have recognized that there is a circuit split on the issue of whether the AIA applies to later-filed state actions. *See, e.g.*, Pet App. 14a (noting that First, Seventh, and

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[1] *See, e.g., Aetna Health Inc.*, 2004 U.S. LEXIS 4571, at *14 ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 124 S. Ct. 1330, 1341 (2004) ("ERISA's goal, this Court has emphasized, is 'uniform national treatment of [plan] benefits.'" (quoting *Patterson v. Shumate*, 504 U.S. 753, 765 (1992)); *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) ("One of the principal goals of ERISA is to enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Uniformity is impossible, however, if plans are subject to different legal obligations in different States.'" (citation omitted)); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (noting that Congress sought through ERISA "to establish a uniform administrative scheme"; "[s]uch a system is difficult to achieve, however," where plan would be required "to make certain benefits available in some States but not in others").

Eighth Circuits have held that AIA does not apply to later-filed state actions, while Fifth and Sixth Circuits "have rejected this judicial exception"); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 884 (5th Cir. 1993) ("A circuit split exists on the question of whether the [AIA] has any application where the injunction is sought before a state suit has been filed but is not issued until after a state suit was filed."), *cert. denied*, 511 U.S. 1032 (1994); *Standard Microsystems Corp. v. Tex. Instruments Inc.*, 916 F.2d 58, 61 (2d Cir. 1990) (noting that First, Seventh, and Eighth Circuits had taken position that AIA does not apply to later-filed actions, which position had been "rejected in the Sixth [Circuit]"); *Roth v. Bank of Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978) ("rejecting the guidance of *Barancik*"), *cert. dismissed*, 442 U.S. 925 (1979); *see also* Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. Pa. L. Rev. 91, 152 n.255 (1998) (recognizing that "appellate courts are divided [over] whether or not the AIA's prohibition applies in situations where, at the time the federal court is requested to enjoin the filing of a state suit, the state suit has not been filed, but where a state suit is then filed prior to the issuance of a federal injunction prohibiting such a suit").

This debate has percolated and developed in the Courts of Appeals over a quarter century. Seven Courts of Appeals have spoken, but they cannot reach a consensus. There is accordingly no reason to postpone review of this question.

A. The First, Seventh, And Eighth Circuits Would Not Have Authorized Dismissal Of Petitioners' Federal Court Action Under The AIA

1. Had Petitioners litigated their case in the Seventh Circuit, the AIA would not have applied to its claims for the reasons set forth by then-Judge Stevens in *Barancik v.*

Investors Funding Corp. of New York, 489 F.2d 933 (7th Cir. 1973), and followed in the circuit for over thirty years. The *Barancik* plaintiffs, like Petitioners here, instituted an action in federal court to preserve their rights under federal law and sought to prevent the defendants from instituting state proceedings concerning the same subject matter. And the *Barancik* defendants, just like the Commissioner here, sought to defeat federal jurisdiction by filing a subsequent action in state court before the federal court could resolve the issues before it. The federal district court enjoined defendants "from prosecuting any proceeding to adjudicate the interests of the parties" before it reached its decision, and the Seventh Circuit affirmed. 489 F.2d at 935, 938.

The Seventh Circuit held that "the mandatory prohibition in § 2283 against injunctions staying court proceedings does not apply to state actions commenced after a motion for injunctive relief is filed in the federal court," *id.* at 938, based on four key principles. First, if Section 2283 did not apply to later-filed state actions, "a litigant would have an absolute right to defeat a well-founded motion by taking the very step the federal court was being urged to enjoin." *Id.* at 937. Second, applying Section 2283 to later-filed state actions would dissuade federal courts from fully considering motions for injunctive relief because "its authority to rule on the pending motion could be terminated by the action of one of the litigants." *Id.* ("consider[ing] this possibility unseemly"). Third, using temporary restraining orders to protect the authority of federal courts against the overbroad application of Section 2283 could "encourage the liberal granting of the kind of protective orders the [AIA] was intended to prevent" and "require the court to take action without notice to the opposing party lest the court's power be defeated before it can rule with deliberation." *Id.* at 938. Fourth, the court noted that because the AIA specifically excludes from its reach injunctions issued "in aid

of the federal court's jurisdiction," it "reflects a congressional purpose to avoid subordinating the exercise of federal judicial power to the will of one of the litigants." *Id.* The *Barancik* rule has been applied repeatedly and never questioned by the Seventh Circuit.[2]

2. The Eighth Circuit has consistently followed the *Barancik* rule for over twenty years; it, too, would have allowed Petitioners to pursue their claims for equitable relief. In *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982), the Eighth Circuit explicitly adopted the *Barancik* rule, endorsed the reasons supporting it, and affirmed the district court's order enjoining the defendants' later-filed state action, even though the state action was instituted only three days after the federal action.

The decisive question for the Eighth Circuit was whether state court proceedings had commenced at the time the *National City Lines* plaintiffs first requested injunctive relief in federal court. Citing *Barancik*, the court held that "[f]or reasons set forth by then Circuit Judge, now Justice Stevens, the question whether state actions are 'pending' is appropriately answered by reference to the date on which injunctive relief is *sought* in federal court, not the date on which injunctive relief is *granted*." 687 F.2d at 1127. Because the federal action seeking injunctive relief predated the state action (if only by days), the court held that "the Anti-Injunction Act presented no bar to the district court's injunction against state court proceedings." *Id.* at 1128.

3. The First Circuit also adopted the *Barancik* rule in *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st

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[2] *See, e.g., Olcott Int'l & Co. v. Micro Data Base Sys., Inc.*, No. IP 99-180-C-B/S, 2000 U.S. Dist. LEXIS 9303, at *3 (S.D. Ind. June 29, 2000); *In re Mexico Money Transfer Litig.*, Nos. 98 C 2407, 98 C 2408, 1999 U.S. Dist. LEXIS 17268, at *9 (N.D. Ill. Oct. 13, 1999); *H. G. Gallimore, Inc. v. Abdula*, No. 85 C 7190, 1986 U.S. Dist. LEXIS 25543, at *3 (N.D. Ill. May 13, 1986); *Babcock & Wilcox Co. v. Pub. Serv. Co. of Ind., Inc.*, No. 76-98, 1976 U.S. Dist. LEXIS 11843, at *3 (S.D. Ind. Dec. 14, 1976).

Cir. 1988). In *Hyde Park*, the federal defendants instituted a state action less than six hours after the federal action was filed. The *Hyde Park* plaintiffs removed the state action, and the federal court enjoined further state proceedings. The First Circuit rejected the State's claim that use of removal in this manner violated the AIA. The court reasoned that the "[r]emoval was proper *even if* it was done in order to escape the strictures of the Anti-Injunction Act" (emphasis added), and that removal could not be viewed as an end run around the AIA "in any event" because Section 2283 "does not ... bar injunctive relief that would run against a state court—as, in effect would the relief ordered here ... when the federal court's injunctive power is *invoked* (*i.e.* requested) by the plaintiff before the state court action is commenced." *Id.* at 842 & n.6 (citing *Barancik* and *National City Lines*). Because the *Hyde Park* plaintiffs had requested injunctive relief in their federal action prior to the initiation of state court proceedings (if only by hours), the court reasoned that Section 2283 would have imposed no restriction on the district court's authority.[3]

B. The Fourth Circuit Explicitly Rejected The *Barancik* Rule And Aligned Itself With The Fifth And Sixth Circuits

The Fourth Circuit disagreed with then-Judge Stevens's reasoning and joined the Sixth and Seventh Circuits by explicitly refusing to apply the *Barancik* rule. Those courts

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[3] The Fourth Circuit viewed this reasoning as "dicta." Pet. App. 14a. That characterization is incorrect because the First Circuit relied on the *Barancik* rule as an alternative reason for concluding that the challenged use of removal did not contravene the AIA. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (explaining that the exclusive basis for a judgment is not dicta: "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound"); *Philip Morris Inc. v. Harshbarger*, 946 F. Supp. 1067, 1074-75 (D. Mass. 1996) (concluding that AIA did not apply to later-filed state suit, despite acknowledged circuit split on issue, because in *Hyde Park* "the First Circuit has spoken").

categorically apply the AIA to later-filed state actions—a position also supported by the Second Circuit in dicta. Given those circuits' ardent criticism of the then-Judge Stevens's rationale, and their extensive consideration of the competing views advanced by both sides of the debate, there is no reason to believe that they will reconsider their opinions or that the Courts of Appeals ultimately will unite behind the *Barancik* rule.

The Sixth Circuit was the first Court of Appeals to reject *Barancik*. *See Roth v. Bank of Commonwealth*, 583 F.2d 527 (6th Cir. 1978). In *Roth*, the federal district court issued a preliminary injunction prohibiting the defendants from "prosecuting any separate civil actions against the named plaintiffs" in connection with the relevant subject matter. *Id.* at 530. The Court of Appeals held that the AIA applied to the later-filed state actions and thus concluded that the district court's injunction violated the AIA. The Sixth Circuit reasoned that the three enumerated exceptions to its prohibitions were exclusive and the *Barancik* rule did not fit within the language of those exceptions. *Id.* at 533-34. The Sixth Circuit found the policy reasons advanced by the *Barancik* court unpersuasive.[4]

The Fifth Circuit followed suit in *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877 (5th Cir. 1993). The *Royal Insurance* court specifically noted that "[a] circuit split exists on the question of whether the [AIA] has any application where the injunction is sought before a state suit has been filed but is not issued until after a state suit was filed," but aligned itself with *Roth*. *Id.* at 884-85. After

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[4] *See also Tropf v. Fid. Nat'l Title Ins. Co.*, 289 F.3d 929, 941 (6th Cir. 2002) (citing *Roth* for the proposition that the "Anti-Injunction Act prohibits federal courts from issuing injunctions against state court proceedings 'commenced after the institution of the federal suit but before the ... the injunction was issued'"), *cert. denied*, 537 U.S. 1118 (2003); *Martingale v. City of Louisville*, 361 F.3d 297, 304 (6th Cir. 2004) (citing *Roth* for same proposition).

considerable analysis, the Court of Appeals found *Barancik*'s "reasoning to be questionable," concluded that "*Roth* provides the better analysis," and held that "the Act applies whenever a state suit is pending, regardless of when it was filed."[5] *Id.* at 885.

The Second Circuit also expressed opposition to the *Barancik* rule in *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58 (2d Cir. 1990). The Court of Appeals recognized a circuit split on the issue, considered the policy reasons advanced by the *Barancik* court, and "d[id] not find its reasoning compelling." *Id.* at 62. The court expressed "considerable doubt whether the *Barancik* rule should be adopted in this circuit," but ultimately concluded that it need not reach the issue. *Id.*

II. THE FOURTH CIRCUIT'S HOLDING FURTHER DIVIDES THE CIRCUITS ON THE QUESTION WHETHER ERISA IS AN "EXPRESSLY AUTHORIZED" EXCEPTION TO SECTION 2283

A. The Lack Of Clear Standards For Identifying Statutes That Expressly Authorize Exceptions To The AIA Has Led To A Conflict In The Circuits

By its terms, the AIA does not apply if the injunctive relief requested is "expressly authorized by Act of Congress." 28 U.S.C. § 2283. This Court last considered whether federal laws satisfied the "expressly authorized" exception in *Mitchum v. Foster*, 407 U.S. 225 (1972) (42 U.S.C. § 1983), and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (Clayton Act). Over the past twenty-five years, lower courts have struggled to apply the standards established in *Mitchum* and *Vendo* in the context of ERISA.

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[5] *See also Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 400 n.11 (5th Cir. 2003).

As Judge Becker observed in *1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401 (3d Cir. 1992), "[t]he *Mitchum* test ... has proven more difficult to apply" and "[t]he only Supreme Court case on this point since *Mitchum* is *Vendo* ... where the Court split three ways." 968 F.2d at 408-09; *see also* Pet. App. 22a (Williams, J., concurring) (expressing doubt about the proper application of the AIA to ERISA because "[t]he Supreme Court has not spoken clearly as to whether the AIA should be interpreted using a categorical or case-by-case approach" and noting divergent views expressed in the three *Vendo* opinions).

In *Mitchum*, a unanimous Court held that a statute "need not contain an express reference" to the AIA, and "need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception" to the Act. 407 U.S. at 237. A federal statute provides the necessary express authorization if (1) it clearly "creat[es] a federal right or remedy enforceable in a federal court of equity" and (2) that right or remedy "could be given its intended scope only by the stay of a state court proceeding." *Id.* (applying this two-part test to conclude that 42 U.S.C. § 1983 constitutes an "expressly authorized" exception to Section 2283).

In *Vendo*, this Court considered whether Section 16 of the Clayton Act, which authorizes private individuals to seek injunctive relief for violations of antitrust laws, provides the necessary express authorization to avoid Section 2283. The *Vendo* court issued three separate and conflicting opinions. A plurality of three Justices found that the second prong of the *Mitchum* test should be modified to require that "the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding." 433 U.S. at 640-41. The plurality agreed that

42 U.S.C. § 1983 met this revised standard but concluded that Section 16 of the Clayton Act did not. *Id.* at 633.

Two justices concurred with the plurality's judgment but disagreed with its rationale. They adopted a case-by-case approach according to which the Clayton Act is an expressly authorized exception "under narrowly limited circumstances" when (i) state court proceedings are "part of a 'pattern of baseless, repetitive claims' that are being used as an anticompetitive device," (ii) traditional requirements for equitable relief are satisfied, and (iii) such relief is necessary to enforce antitrust laws. *Id.* at 644. Further, four dissenters found that the Clayton Act satisfied the *Mitchum* test and therefore was an "expressly authorized" exception to Section 2283. *Id.* at 656. Thus, six Justices actually held that the Clayton Act does "expressly authorize" injunctions against some state court suits.

Five Courts of Appeals have considered whether ERISA provides the express authorization necessary to avoid Section 2283's prohibitions under the standards applied in *Mitchum* and *Vendo*. Two circuits have squarely held that ERISA does "expressly authorize" actions for injunctive relief otherwise barred by Section 2283. Three other circuits have dismissed ERISA actions based upon the AIA. And at least three Courts of Appeals have specifically recognized that there is a split in the circuits on the question whether ERISA is an "expressly authorized" exception to Section 2283 under the *Mitchum-Vendo* standards. *See, e.g.*, Pet. App. 13a n.9 (recognizing "circuit split" on the issue); *ERM*, 65 F.3d at 1132 ("Other circuits are divided on the issue of whether ERISA carves an exception into the [AIA] that enables federal courts to enjoin state proceedings when a party raises a question of federal law under ERISA."); *United States Steel Corp. Plan for Employees Ins. Benefits v. Musisko*, 885 F.2d 1170, 1178 (3d Cir. 1989) (recognizing that its holding conflicted with a decision of the Second

Circuit and concluding that "we are not swayed by it"), *cert. denied*, 493 U.S. 1074 (1990); *Total Plan Servs. Inc. v. Tex. Retailers Ass'n*, 925 F.2d 142, 145 & n.3 (5th Cir. 1991) (noting that its holding conflicted with a decision of the Sixth Circuit).

B. The Second And Sixth Circuits Would Have Concluded That The Injunctive And Declaratory Relief Petitioners Requested Was "Expressly Authorized" By ERISA

1. The Sixth Circuit was the first to consider whether ERISA provides an "expressly authorized" exception to the AIA. *See Gen. Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980). The *Buha* court concluded that ERISA satisfies the first prong of *Mitchum* because it "confers a uniquely federal right or remedy." *Id.* at 458-59. The court explained that ERISA contains a provision preempting state laws and confers exclusive jurisdiction in federal district courts for actions by ERISA fiduciaries "to provide a uniform and systematic framework for regulation of employee benefit plans." *Id.* at 459 ("It is central to the statutory scheme that ERISA not be subject to state and local laws which might frustrate its goals."). The *Buha* defendant's state action, if successful, would have required payments in violation of the Sixth Circuit's interpretation of ERISA—a result at odds with ERISA's goal of assuring "'the equitable character of such plans and their financial soundness.'" *Id.* (quoting 29 U.S.C. § 1001(a)). Because ERISA specifically limits the role of state courts to achieve its commitment to uniformity, the Sixth Circuit held that the second *Mitchum* prong was met where, as there, the state court action would "have the effect of making it impossible for a fiduciary ... to carry out

its responsibilities under ERISA" by requiring payments from the plan that ERISA prohibited. *Id.* at 458-59.[6]

As in *Buha*, the state court action in this case, if successful, would undermine both the "equitable character" and "financial soundness" of Petitioners' vacation plan—on an even greater scale. Respondents' requested relief would force Petitioners to provide California workers preferential benefits; to pay thousands of employees in contravention of the terms of the plan, which must be followed under ERISA; and to increase the plan's costs substantially. The Sixth Circuit accordingly would not have dismissed the complaint under the AIA.

2. The Second Circuit, too, would have exempted Petitioners' claims for relief from the AIA under ERISA. *See Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd on other grounds sub nom. Roberts v. Burlington Indus., Inc.*, 477 U.S. 901 (1986). In *Gilbert*, a number of former employees filed claims with a state labor agency, seeking payment of certain benefits upon termination of their employment. The Court of Appeals affirmed a district court order permanently enjoining the state administrative proceedings on ERISA preemption grounds, holding that "Burlington is a fiduciary ... and is authorized under [ERISA] to seek an injunction of the state proceedings." *Id.* at 322-324, 329. The court further held that the injunction did not violate Section 2283 because it "falls within the Act's exception for actions 'expressly authorized' by federal law." *Id.* at 329.

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[6] *See also Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 403 (6th Cir. 1997) ("Indeed, this court's decision in [*Buha*] recognizes an overriding federal interest in federal adjudication of ERISA claims. In *Buha*, we held that ERISA clearly creates a federal right or remedy enforceable in a federal court of equity, and that ERISA could be given its intended scope only by the stay of a state court proceeding.").

It is not apparent from the *Gilbert* opinion whether the Second Circuit established a categorical rule that any request by an ERISA fiduciary to enjoin state proceedings satisfies the *Mitchum* standard or whether the court simply determined that the standard was met under the particular facts presented there. In that case, as in *Buha*, the employee plaintiffs' state proceedings, if successful, would have required the company to provide those employees special benefits and would have imposed greater costs on the ERISA plan. Thus, at the least, the Second Circuit agreed with the Sixth Circuit's conclusion that where an ERISA fiduciary seeks to enjoin state proceedings that would undermine the "equitable character" and "financial soundness" goals of ERISA, Section 2283 is no bar. Because Respondents' state action threatens the same harms here, Petitioner would have prevailed in the Second Circuit.

3. Petitioners may also have secured injunctive relief under the Third Circuit's interpretation of the "expressly authorized" exception to the AIA. The Third Circuit has twice held that ERISA did not "expressly authorize" actions filed to enjoin state proceedings. But the Court did not do what the Fourth Circuit did here and unequivocally adopt a categorical rule prohibiting injunctions of state proceedings in ERISA cases. As Judge Williams recognized in her concurring opinion, the Third Circuit appears to have "adopted a case-by-case approach." Pet. App. 22a.

In *United States Steel Corp. Plan for Employee Insurance Benefits v. Musisko*, 885 F.2d 1170 (3d Cir. 1989), an insurance company sought declaratory and injunctive relief in federal court to "void [an insured employee's] state judgment and to compel ERISA's application to the state lawsuit." *Id.* at 1172. The district court granted the requested relief, and the Court of Appeals reversed. *Id.* at 1172-73, 1180. The Third Circuit reasoned that, because ERISA's legislative history and statutory language were

"inadequate to demonstrate a congressional desire to defeat the bar of section 2283," ERISA did not constitute an "expressly authorized" exception to the AIA at least in that factual context. *See id.* at 1177-78 (distinguishing *Buha* based on "important factual differences").

In *Nobers*, the Third Circuit held that the AIA prohibited the injunction of a state court proceeding brought against five ERISA plans by former employees of the companies administering them. 968 F.2d at 411. It reiterated the view that ERISA did not "'expressly authorize' injunctions of state court actions," "even if the state court claims are subject to exclusive federal jurisdiction." *Id.* at 409-10. The Court further explained, however, that even if ERISA authorized an exception in some circumstances, the state litigation at issue in *Nobers* could not be enjoined. *Id.* at 410. The court reasoned that the outcome would "have no binding effect on the plans," would require no transfer of plan assets, and thus "will not prevent [the administrators] from complying with ERISA." *Id.* The opposite is true here. Respondents have expressly sought a state decree requiring a Petitioner to "cease and desist" administration of the plan in accordance with its terms. Thus, any such decree would have a "binding effect" on the plan that would prevent "compl[iance] with ERISA['s]" mandate to follow the terms of the plan. *Id.*

C. The Fourth Circuit Aligned Itself With The Fifth Circuit And Dismissed This Action Based On Its Determination That ERISA Can Never Constitute An "Expressly Authorized" Exception To The AIA

In rejecting Petitioners' argument that ERISA provided an "expressly authorized" exception to Section 2283 in this case, the Fourth Circuit noted that it had already thoroughly considered and rejected that position in

Employers Resource Management Co. v. Shannon, 65 F.3d 1126 (4th Cir. 1995). Pet App. 13a n.9. The Court of Appeals declined to revisit the issue, confirmed the breadth of its prior holding, and firmly aligned itself with the Fifth Circuit's interpretation of the AIA.

In *ERM*, a state agency initiated state court proceedings in an effort to apply state insurance laws to certain welfare benefits plans. The district court denied the plan fiduciary's request for declaratory and injunctive relief to prevent the state action on AIA grounds. The Fourth Circuit noted that "[o]ther circuits are divided on the issue of whether ERISA carves an exception into the Anti-Injunction Act" and "join[ed] the Third and Fifth Circuits in rejecting the notion that ERISA operates as an automatic exception to the Anti-Injunction Act." 65 F.3d at 1132. Specifically, the *ERM* court concluded that ERISA failed the first *Mitchum* element—that is, it did not establish the "type of 'unique' federal right or remedy that was at issue in *Mitchum*'s consideration of 42 U.S.C. § 1983." *Id.* at 1131. The court therefore affirmed the district court's denial of injunctive and declaratory relief on AIA grounds.

Petitioners argued below that *ERM* "did not hold that ERISA *never* operates as an exception," suggesting that fiduciaries could satisfy the *Mitchum* test in appropriate cases. *See* Pet App. 13a n.9. The Court rejected that claim, clarifying that *ERM* forecloses ERISA from ever constituting an "expressly authorized" exception to Section 2283. *Id.* ("Denny's misreads our opinion."); *see also id.* at 21a-22a (Williams, J., concurring) (noting that majority opinion "adopted a categorical approach and extended *Employers Resource Management* to all ERISA cases").

The Fifth Circuit has reached the same result. *See Total Plan Servs., Inc. v. Tex. Retailers Ass'n*, 925 F.2d 142 (5th Cir. 1991). In that case, the appellants had sought declaratory and injunctive relief in federal district court to

enjoin state court proceedings involving an ERISA plan, which the district court refused to grant on AIA grounds. *Id.* at 143. The appellants contended that Section 1132 of ERISA "expressly authorized" an exception to the AIA because it provides a federal right "'to enjoin any act or practice which violates'" ERISA. *Id.* at 144 (quoting 29 U.S.C. § 1132(a)(3)). The court rejected this argument, reasoning that "the mere filing of a state court proceeding" does not constitute a "violation" of ERISA. *Id.* Moreover, the Fifth Circuit explicitly adopted the reasoning of *Musisko* and rejected the notion that, in ERISA cases, "'federal rights will not be adequately protected in state courts.'" *Id.* at 145-46 (citation omitted). The court thus held "that ERISA does not fall within the 'expressly authorized' exception of section 2283" and affirmed. *Id.* The Court of Appeals specifically considered and rejected the standards adopted in *Buha*. *Id.* at 145 n.3.

III. THE FOURTH CIRCUIT'S HOLDING THAT THE AIA PROHIBITS THE DECLARATORY RELIEF SOUGHT HERE CONFLICTS WITH DECISIONS OF THE THIRD AND FIFTH CIRCUITS

Although the literal text of the AIA only encompasses "injunctions," the AIA has been interpreted to foreclose some forms of declaratory relief. The courts of appeals nevertheless apply divergent standards to the issue that control the outcome in this case.

1. The Fourth Circuit held that the AIA prohibited the district court from granting any of the declaratory relief Petitioners requested, including "a declaration that the Plan and Trust constitute an ERISA plan" and "a declaration that 'ERISA preempts the California statutes [and] regulations'" at issue in the dispute. Pet. App. 3a-4a, 18a. The Court recognized that the issuance of a federal court order declaring that "ERISA preempts the California

statutes [and] regulations" is not actually the same form of relief as an "injunction to stay proceedings in State court"—the only relief expressly barred by the terms of the AIA. *Id.* at 4a, 12a n.8. It nevertheless reasoned that this relief would have the same "effect" as an injunction to "stay proceedings" in state court. *Id.* at 12a n.8

That rationale cannot be reconciled with this Court's precedents, which have "never viewed parallel *in personam* actions as interfering with the jurisdiction of either court" or implicating the strictures of the AIA because each court is free to proceed, and whenever judgment is rendered, "'the effect ... is to be determined by the application of principles of *res judicata*.'" *Vendo*, 433 U.S. at 642 (citation omitted). The potential for *res judicata* effect accordingly should not be the sole standard for identifying declaratory relief barred by the AIA. Yet that is the only way that this declaratory relief would have had the same "effect" as an injunction.

Other circuits have declined to adopt that view and have instead adopted standards that would have authorized some relief here. In *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328 (3d Cir. 1971), the Third Circuit exempted from the AIA's reach declaratory judgments addressing a critical federal question where "the state suit is likely to turn on [that] question of federal law"; the question is one with which the "federal court is likely to be more familiar and experienced than the state court"; and the state court "does not proceed in normal course to adjudicate the matter or otherwise manifests willingness to hold its hand pending federal decision of the question." 448 F.2d at 1332. In that case, the Court of Appeals upheld the district court's decision not to dismiss a federal action on AIA grounds where the first two elements were satisfied, pending a finding "by the district court that the state court is willing to hold the matter before it in abeyance pending a declaratory federal adjudication." *Id.* Each of the required

Thiokol elements is present here: the state and federal actions turn on whether the Plan and the Trust are ERISA plans; Congress itself has recognized that federal courts are better equipped to address that question; and the California state court voluntarily stayed proceedings to allow the district court and Court of Appeals to consider the issues before them. Had this case been litigated in the Third Circuit, Petitioners' claims for declaratory relief would not have been dismissed under the AIA.

Nor would the complaint have been dismissed in the Fifth Circuit. In *Travelers Insurance Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774 (5th Cir. 1993), the Fifth Circuit held that declaratory relief is not prohibited by the AIA if its purpose is consistent with the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* ("DJA"). 996 F.2d at 776-77. The Court of Appeals reasoned that the declaratory relief in that case was consistent with the DJA because it was not brought to nullify a party's advantage in a prior-filed state suit or to change forums and it had the effect of preventing a multiplicity of suits. *Id.* (contrasting *Tex. Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 505 (5th Ci r. 1988), in which "the *only* purpose and effect" of the federal suit was to defeat a prior-filed state suit and overrule a prior determination against it in state court). Here, Petitioners were *required* to bring their action in federal court because ERISA created exclusive federal jurisdiction over their claim. As in *Travelers*, by resolving its status as an ERISA plan in federal court, Petitioners seek to prevent a multiplicity of suits throughout the thirty-six states in which it employs workers based on claims that its vacation benefit plan is not covered by ERISA. Because Petitioners' request for declaratory relief is fully consistent with the purposes of the DJA, the Fifth Circuit would not have prohibited it under the AIA.

IV. THE FOURTH CIRCUIT'S DECISION RAISES ISSUES OF RECURRING NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

Resolution of the persistent conflicts at issue here represents a matter of great national importance.

First, this Court has recognized that the AIA establishes important parameters in the relationship between federal and state courts. "It represents Congress' considered judgment as to how to balance the tensions inherent in such a system." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). The primary purpose of Section 2283 is to prevent "friction between the state and federal courts," *Vendo*, 433 U.S. at 630, but that purpose cannot be served if litigants and courts are confused about the scope of the AIA's restrictions. Respondents presumably would not have filed their subsequent state action if they had clear guidance that the AIA does not apply to Petitioners' claims, eliminating any interference with the district court's ability to exercise its exclusive jurisdiction under ERISA. The confusion among the circuits regarding the application of Section 2283 to later-filed state actions and ERISA-related claims (and the uncertainty it has produced) thereby perpetuates the friction between federal and state courts that the AIA was designed to eliminate.

Second, resolution of these issues is necessary to determine the *nationwide* standards governing the rights and duties of ERISA fiduciaries that Congress has so plainly demanded. Congress gave fiduciaries in every state the right to bring civil actions in the exclusive jurisdiction of federal courts "to enjoin any act or practice which violates any provision" of ERISA or the terms of any employee benefit plan and to "enforce" the terms of ERISA. 29 U.S.C. § 1132(a). As it stands now, that right is seriously

curtailed by the AIA in some states but not others. As this Court has emphasized "'the crowning achievement of this legislation [is] the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.'" *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (quoting Rep. Dent, 120 Cong. Rec. 29, 197 (1974)); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (stating that "the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans" and noting "[t]his principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law").

The lack of uniformity in the treatment of ERISA under Section 2283 contradicts Congress's goals as set forth in ERISA and the AIA. It creates confusion for thousands of fiduciaries, for plan participants and beneficiaries, for state agencies, and for state and federal courts across the country. It encourages litigants to forum shop, reduces judicial efficiency, and creates needless friction between (and uncertainty among) the federal and state courts. This case places before the Court the three crucial issues generating this critical instability and thus offers an excellent opportunity for this Court to establish clear uniform standards in a manner consistent with Congress's intent.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST, PLAINTIFFS-APPELLANTS,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, DEFENDANTS-APPELLEES.

AMERICAN ASSOCIATION OF RETIRED PERSONS, AMICUS SUPPORTING APPELLEE.

No. 03-1326.

Appeal from the United States District Court for the District of South Carolina, at Spartanburg
Henry M. Herlong, Jr., District Judge
(CA-02-2968-7-20)

Argued: January 20, 2004.
Decided: April 12, 2004.

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Vacated and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Widener joined. Judge Williams wrote a concurring opinion.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Upon notification from California officials that its vacation pay practices violated state labor law, Denny's, Inc. brought this action in federal court in South Carolina. Denny's asked the court to declare that the Employee Retirement Income Security Act (ERISA) preempted these state-law claims, and enjoin the California Labor Commissioner from applying the state law against Denny's. Shortly thereafter, the Commissioner sued Denny's in state court in California seeking to enforce the state law. Several months later, the district court dismissed this action, finding it lacked personal jurisdiction over the Commissioner. We believe that the court did have jurisdiction, but conclude that the Anti-Injunction Act bars all of the relief that Denny's seeks. Accordingly, we vacate the judgment of the district court and remand for entry of an order dismissing the complaint for failure to state a claim upon which relief can be granted.

I.

Denny's, a restaurant chain with its principal place of business in South Carolina, maintains the Denny's, Inc. Vacation Plan ("the Plan") and the Denny's, Inc. Employee Benefits Trust ("the Trust") for the stated purpose of providing vacation benefits to eligible employees. The Plan provides that salaried and hourly employees cannot use vacation benefit days and will not be paid any vacation benefits upon termination of their employment until and unless they have completed, respectively, six months or one year of continuous employment with Denny's.

On July 11, 2002, Denny's received a letter from an attorney at the California Department of Industrial Relations. The purpose of the letter was "to come to a global resolution" of issues raised by claims of former Denny's employees filed with the California Labor Commissioner. The attorney explained that Denny's policy requiring forfeiture of vacation benefits when employees leave prior to six months or one year of employment violated Cal. Lab. Code § 227.3. That statute provides that when "an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages" and, further, "that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." § 227.3.

The California attorney noted that the Department had concluded that "Denny's method of funding its vacation pay plan constituted a payroll practice and the plan is not therefore an ERISA plan which preempts state enforcement laws." The attorney recounted prior discussions and litigation between the parties on this issue, including a state court's refusal to grant summary judgment to Denny's on its pre-emption defense. Given the numerous claims filed with the Department, the attorney proposed that Denny's meet with the Commissioner and discuss an "amicable resolution" to avoid "the time and expense of litigation." Otherwise, the Department would have "to file an action against Denny's to finally resolve this issue."

In response, on September 6, 2002, Denny's[1] filed this action for declaratory and injunctive relief in federal court in South Carolina against the Commissioner and the director of the Department of Industrial Relations (collectively, "Commissioner"). Denny's sought: (1) a declaration that the

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[1] We refer within to all plaintiffs/appellants—Denny's (in its fiduciary capacity as Plan administrator), the Plan, the Trust, and Andrew F. Green, in his capacity as trustee of the Trust—collectively as "Denny's."

Plan and Trust constitute an ERISA plan; (2) a declaration that "ERISA preempts the California statutes, regulations, and any action or decision" of the Commissioner "having the effect of law that [the Commissioner] seek[s] to enforce against [Denny's] based upon California law"; and (3) "[p]reliminary and permanent injunctions barring [the Commissioner] from taking any action to enforce California law against [Denny's] with regard to the Plan and the Trust."

Three weeks later, the Commissioner filed a complaint against Denny's in California state court, for damages and injunctive relief. The Commissioner asked the state court to award it unpaid vacation wages and waiting time penalties pursuant to Cal. Lab. Code § 203, and to order Denny's to "cease and desist from violating" all provisions of the state labor code. In its answer to the Commissioner's state court lawsuit, Denny's alleged ERISA preemption as an affirmative defense.

The Commissioner then moved to dismiss the present action, contending that a federal district court in South Carolina lacked personal jurisdiction over the California officials, notwithstanding ERISA's nationwide service of process provision, 29 U.S.C. § 1132(e)(2) (2000). Alternatively, the Commissioner contended that the Anti-Injunction Act, 28 U.S.C. § 2283 (2000) and abstention based on *Younger v. Harris*, 401 U.S. 37 (1971), compelled dismissal. On February 27, 2003, the district court granted the Commissioner's motion, concluding that it had no personal jurisdiction over the Commissioner. *Denny's, Inc. v. Cake*, 247 F. Supp. 2d 813 (D.S.C. 2003).

II.

We turn first to the question of whether the district court could exercise personal jurisdiction over the Commissioner under 29 U.S.C. § 1132(e)(2). In the case at

hand the answer to that question hinges on the court's subject matter jurisdiction under 29 U.S.C. § 1132(a)(3).

ERISA contains a nationwide service of process provision that permits an ERISA enforcement action to be brought in federal court in a district "where the plan is administered" and process to be "served in any other district where a defendant resides or may be found." § 1132(e)(2). Accordingly, since the Plan is administered in Spartanburg, South Carolina, and the Commissioner has been served in California, a district court sitting in South Carolina would have personal jurisdiction over the Commissioner under § 1132(e)(2) *if* this is a proper ERISA enforcement action—that is, if the court had subject matter jurisdiction over the action under § 1132(a)(3).[2] Section 1132(a)(3) provides that "a participant, beneficiary, or fiduciary" may bring an ERISA enforcement action in federal court:

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) *to enforce any provisions of this subchapter* or the terms of the plan[.]

29 U.S.C. § 1132(a)(3) (emphasis added).

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[2] This, of course, assumes that the assertion of personal jurisdiction over the Commissioner would satisfy Fifth Amendment due process requirements. The Commissioner tentatively argues that it would not. Brief of Appellee at 25 n.9. But the Commissioner has not demonstrated that the district court's assertion of personal jurisdiction over him would result in "such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy" evidenced by a nationwide service of process provision. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997). Nor has the Commissioner suggested any persuasive reason *why* the *ESAB* standard, formulated in the context of the RICO nationwide service of process provision, does not apply here. Accordingly, we reject this argument.

Section 1132(a)(3)(B) thus permits an ERISA fiduciary to bring an action to "enforce any provisions of this subchapter." *Id.* Indisputably, "this subchapter" refers to subchapter I of Chapter 18 of the United States Code, which codified Title I of ERISA and includes 29 U.S.C. §§ 1001-1191. "[T]his subchapter" thus clearly contains ERISA's preemption provision, 29 U.S.C. § 1144. The plain language of § 1132(a)(3)(B) therefore appears to permit an ERISA fiduciary to bring an action to "enforce" § 1144—a "provision of this subchapter."[3]

Indeed, the Supreme Court has expressly stated that "[u]nder § 502(a)(3)(B) of ERISA [§ 1132(a)(3)(B)], a participant, beneficiary or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court to determine whether the plan's trustees may comply with a state [law]." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 26-27 (1983). The Court ultimately rejected the view that a state action brought by the California Franchise Tax Board against an ERISA fiduciary for a declaration that the fiduciary must comply with state law arose under ERISA and so could be removed

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[3] Contrary to Denny's assertions, § 1132(a)(3)(B) does not permit it to bring an action solely to seek a declaration that the Plan is an ERISA plan. Although a holding as to whether ERISA preempts the Commissioner's application of California law would necessarily include a determination as to whether Denny's plan is actually an ERISA plan, a suit to seek *only* a declaration that the Plan is an ERISA plan could not stand on its own. Absent the Commissioner's threat to enforce California law against the Plan and Denny's contention that such enforcement would violate ERISA, no enforcement or potential violation of ERISA or the Plan would be at issue. Thus, as the district court noted, the "crux" of this case is "the issue of preemption." *Denny's*, 247 F. Supp. at 817 n. 6. Because an action seeking only a declaratory judgment that the Plan is an ERISA plan would not enforce or remedy a violation of ERISA or the Plan, it could not be brought under § 1132(a)(3); in fact, such an action would raise no case or controversy. *See* U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 2201 (2000) (authorizing federal courts to issue declaratory judgments only "[i]n a case of actual controversy").

to federal court—but *only* because the tax board itself was not an ERISA "participant, beneficiary, or fiduciary," as required by § 1132(a)(3). *Id.* at 27. The Court assumed that the ERISA fiduciary "could have sought an injunction under ERISA against application to it of state regulations that require acts inconsistent with ERISA," but held that the declaratory action by the *State*, not an ERISA participant, beneficiary, or fiduciary, did not "'arise under' federal law" and so could not be removed to federal court. *Id.* at 20.

In short, both the plain language of § 1132(a)(3) and the Supreme Court's interpretation of it seem to compel the conclusion that an ERISA fiduciary, like Denny's,[4] could bring the instant action to "enforce" § 1144 by way of "an injunction ... against application ... of state regulations that require acts inconsistent with ERISA." *Franchise Tax Bd.*, 463 U.S. at 20.

Yet, the district court held that Denny's declaratory and injunctive action based on ERISA's preemption provision, § 1144, did not constitute an action to "enforce" ERISA within the meaning of § 1132(a)(3)(B). *Denny's*, 247 F. Supp. 2d at 820. The court apparently concluded that because Denny's § 1144 preemption defense in the California case would not suffice to provide federal removal jurisdiction over it, the instant action, based on § 1144, could not be brought under § 1132(a)(3). *Id.* at 820-821. But, as

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[4] Like the district court, we presume Denny's is an ERISA fiduciary for purposes of jurisdiction. In doing so, we have not thereby drawn any conclusion as to the merits of Denny's allegation that the Plan is an ERISA plan, which is central to the determination of whether ERISA preempts the Commissioner's application of state law in this case. *See supra* note 3. To the extent that the question of subject matter jurisdiction under § 1132(a)(3) "involves the merits of [this] dispute," we thus follow "the proper course of action," *i.e.* upon "find[ing] that jurisdiction exists," we leave any objections to be dealt with "as a direct attack on the merits of the plaintiff's case." *United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999) (internal quotation marks and citation omitted).

explained above, neither *Franchise Tax Board* nor the plain language of § 1132(a)(3) provide any basis for treating the present action precisely like one in which a fiduciary seeks removal asserting § 1144 preemption.

We acknowledge that this result may at first seem odd because, just as the present action depends on whether the plaintiff's claim falls within § 1132(a)(3), so too "complete preemption,"[5] which provides a basis for federal removal jurisdiction, depends in the ERISA context upon whether the underlying state law claim falls within § 1132(a). *See, e.g., Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370-71 (4th Cir. 2003). But a court determines "complete preemption" by determining the *plaintiff's* capacity to bring its state law claims under § 1132(a), not the defendant's. *Id.* at 371-72. Thus, the fact that a state court *defendant's* assertion of § 1144 preemption as a defense does not create complete preemption says nothing about whether that defendant could have brought an action to enforce § 1144 preemption as a *plaintiff* in federal court under § 1132(a). In the present case, for instance, the Commissioner could not bring his claims in federal court under § 1132(a) because, like the tax board in *Franchise Tax*

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[5] "Complete preemption" differs from "ordinary" or "conflict" preemption. Conflict preemption arises when a defendant asserts the affirmative defense that a plaintiff's state law claim is preempted by federal law. *Sonoco Products Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370-71 (4th Cir. 2003). Normally, conflict preemption "does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* at 371 (internal quotation marks and citation omitted). By contrast, complete preemption exists when "Congress so completely preempt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* (internal quotation marks and citation omitted). With complete preemption, removal to federal court is possible because "the plaintiff simply has brought a mislabeled federal claim, which may be asserted under some federal statute." *Id.* (internal quotation marks and citation omitted).

Board, he is not an ERISA participant, beneficiary, or fiduciary; as a result, his state court suit is not completely preempted by Denny's assertion of a preemption defense under § 1144. *Id.* at 372-73. But Denny's, as a fiduciary, does not face the same barrier to bringing the instant § 1132(a)(3) action in federal court.

The district court based its contrary decision almost exclusively on *NGS American, Inc. v. Jefferson*, 218 F.3d 519 (6th Cir. 2000). There the Sixth Circuit held that an ERISA fiduciary's federal suit—seeking a declaration that ERISA preempted a beneficiary's threat to initiate private state court litigation against the fiduciary based on an alleged violation of state law—could not be brought under § 1132(a)(3); *see also Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523-24 (11th Cir. 1987) (holding that a fiduciary's declaratory judgment action seeking to determine its liability for benefits claimed by a former employee could not be brought under § 1132(a)(3)).[6] But *Jefferson* involved a fiduciary suing for a declaration that ERISA preempted the threat of a private suit by a beneficiary, while the case at hand involves a very different situation: a fiduciary suing for a declaration that ERISA preempts state authorities from enforcing state law against an ERISA plan. The district court recognized that "the facts of *Jefferson* are easily distinguishable from the facts at hand," but

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[6] In *Gulf Life*, 809 F.2d at 1523, the fiduciary did not request an injunction and the court determined that the requested declaration was not "equitable in nature," and so could not be brought under § 1132(a)(3) for this additional reason. Here, of course, Denny's does seek an injunction and so § 1132(a)(3)(B) relief cannot be denied on that basis. Moreover, the "underlying controversy" here is "equitable" in nature: an effort to force Denny's, via an injunction, to comply with California law. *See Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1251 (9th Cir. 1987) (noting that "a particular declaratory judgment draws its equitable or legal substance from the nature of the underlying controversy"). Thus, the declaratory relief sought in this case clearly also qualifies as "appropriate equitable relief" under § 1132(a)(3)(B).

nevertheless concluded that this "distinction does not affect the application of the *Jefferson* Court's reasoning." *Denny's*, 247 F. Supp. 2d at 821.

The *Jefferson* court itself, however, found this difference extremely significant, taking pains to distinguish the case before it, in which the plaintiff challenged "the permissibility of a private cause of action," from earlier Sixth Circuit precedent, *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376 (6th Cir. 1993), in which the plaintiff challenged "the enforceability of an existing state regulation." *Jefferson*, 218 F.3d at 529. In *Thiokol*, as here, an ERISA fiduciary sought declaratory and injunctive relief in federal court on the basis of § 1144 preemption. 987 F.2d at 380. The *Thiokol* fiduciary, like Denny's in this case, sought to prevent state authorities from enforcing state law provisions against an asserted ERISA plan. *Id.* at 377-78. The *Thiokol* court unequivocally held that, in these circumstances, the fiduciary could bring a § 1144 preemption claim in federal court under § 1132(a)(3). *Id.* at 380.[7]

In determining whether a case falls within § 1132(a)(3), we agree with the Sixth Circuit: an action based on ERISA preemption brought by a fiduciary *to enjoin a private suit* critically differs from such an action brought by a fiduciary to *prevent the enforcement of a state law against an ERISA plan.* A party's private suit, based on an arguably preempted state law, brought against an ERISA plan, poses no threat to violate § 1144 or any other provision of ERISA

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[7] The Commissioner's attempts to distinguish *Thiokol* do not persuade us. True, *Thiokol* did not involve any question as to personal jurisdiction under § 1132(e)(2), but it clearly did involve whether a federal court had jurisdiction over a § 1144 preemption claim under § 1132(a)(3)—the determinative question for personal jurisdiction here—and the Sixth Circuit unequivocally held that it did. *Thiokol*, 987 F.2d at 380. Moreover, whether the *Thiokol* court properly decided another issue—the applicability of the Tax Injunction Act, 28 U.S.C. § 1341 (2000)—does not affect the correctness of the court's § 1132(a)(3) ruling.

or the plan. *See Jefferson*, 218 F.3d at 529-30. The only "harm" in denying injunctive and declaratory relief to the plan's fiduciary in such a case is to force the fiduciary "to raise its preemption claim in state court, or to seek removal to federal district court." *Id.* at 529. But a state suit to enforce a state law against an ERISA plan may well violate ERISA and the plan. In such a case, the plan's fiduciary faces a Hobson's choice: obey the state law, and risk violating the provisions of the plan (and hence ERISA, 29 U.S.C. § 1104(a)(1)(D)), or disobey the state law and then raise "ERISA preemption as a defense in a state enforcement action" and "risk[] breaking the law." *Id.* In addition to potentially coercing a plan fiduciary into violating plan provisions and ERISA, a state's enforcement of an assertedly preempted state law against an ERISA plan (unlike a private suit based on state law) is arguably itself a "violation" of § 1144—which provides that ERISA "shall supercede any and all State laws." *See, e.g., HMI Mech. Sys., Inc. v. McGowan*, 266 F.3d 142, 149 (2d Cir. 2001) (noting that a state's approach to enforcing a law "violated ERISA preemption standards").

In sum, Denny's declaratory and injunctive action to enforce § 1144 falls within § 1132(a)(3), and so the district court did have personal jurisdiction over the Commissioner under § 1132(e)(2). Therefore, we must vacate its judgment dismissing this action for lack of personal jurisdiction.

III.

Because the district court found it lacked personal jurisdiction over the Commissioner, it did not address the Commissioner's alternative Anti-Injunction Act (hereinafter "the Act") argument. The Commissioner reiterates on appeal that the Act bars a federal court from granting the relief requested by Denny's and so requires dismissal of the case for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.[8]

The Act serves as a "necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts" and "represents Congress' considered judgment as to how to balance the tensions inherent in such a system." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). Accordingly, "[w]e take seriously the mandate in the Anti-Injunction Act and recognize that for over two hundred years, the Act has helped to define our nation's system of federalism."

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[8] Although Denny's does not specifically request an "injunction to stay proceedings in State court," it does seek to enjoin state officials "from taking any action to enforce California law against it." If granted, this relief amounts to a "stay of proceedings in a State court." *See, e.g. Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) (finding that the Act "cannot be evaded" by framing an injunction as a restraint on a party rather than directly on the state court). Moreover, when the Act bars an injunction it "also bar[s] the issuance of a declaratory judgment that would have the same effect as an injunction." *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) (en banc) (internal quotation marks and citation omitted). This is clearly the case here: Denny's request for a declaration that ERISA preempts the enforcement of a California labor law against the Plan has "the same effect" as its request for an injunction to prevent enforcement of that state law against the Plan; both "result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971). Thus, if the Act bars the injunction Denny's has sought, it also bars the declaratory relief it has sought. *See, e.g., Employers Res. Mgmt. Co., Inc. v. Shannon*, 65 F.3d 1126, 1129 (4th Cir. 1995) (holding the Act barred the ERISA fiduciary from injunctive *and* declaratory relief); *see also* 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4222, at 503-04 & n.11 (2d ed. 1988 & Supp. 1999) (collecting cases).

Employers Res. Mgmt. Co., Inc. v. Shannon, 65 F.3d 1126, 1130 (4th Cir. 1995).

The Act constitutes "an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977) (plurality opinion). These three exceptions are injunctions: (1) expressly authorized by statute; (2) necessary to aid the court's jurisdiction; or (3) required to protect or effectuate the court's judgments. *Chick Kam Choo*, 486 U.S. at 146; *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287-88 (1970). None of these exceptions apply here.[9]

Notwithstanding the inapplicability of the only exceptions to the Act recognized by Congress, Denny's contends that the Act does not bar its suit because of a judicial exception created by one of our sister circuits and followed by two others. Specifically, Denny's contends that the Act's prohibition on enjoining "proceedings in state court" does not apply because *when it filed this action requesting injunctive relief* in early September 2002, "there

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[9] Denny's does not contend that the second or third exceptions apply. It does offer a brief and unpersuasive suggestion that "§ 1132(a) of ERISA" constitutes express statutory authorization for an injunction and for this reason "operates as an exception" to the Act. Reply Brief at 10. We explicitly held to the contrary in *Employers Resource Management*, 65 F.3d at 1130-34. Seizing on our statement there that we rejected "the notion that ERISA operates as an automatic exception" to the Act, *id.* at 1132, Denny's contends that we "did not hold that ERISA *never* operates as an exception." Reply Brief at 10 (emphasis in original). Denny's misreads our opinion. Although recognizing a "circuit split" on the question and factually distinguishing the cases taking the opposite view, we firmly aligned ourselves with the "sounder position" of the Third and Fifth Circuits and refused "to broaden the three narrow exceptions" to the Act. *Employers' Res. Mgmt.*, 65 F.3d at 1133-34; *see also Total Plan Servs., Inc. v. Texas Retailers Ass'n, Inc.*, 925 F.2d 142, 144 (5th Cir. 1991); *United States Steel Corp. Plan for Employee Ins. Benefits v. Musisko*, 885 F.2d 1170, 1177-78 (3rd Cir. 1989).

were no pending state proceedings, within the meaning of the [Act] or otherwise." Reply Brief at 7.

The Seventh Circuit so held in *Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937 (7th Cir. 1973); *see also Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988) (dicta); *Nat'l City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982). Other circuits, however, have rejected this judicial exception. *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993) (holding that the Act does apply even if the request for federal injunctive relief is filed first); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979) (same); *see also Standard Microsystems Corp. v. Texas Instruments*, 916 F.2d 58, 61-62 (2d Cir. 1990) (criticizing the reasoning in *Barancik* and stating that the court had "considerable doubt [about] whether the *Barancik* rule should be adopted in this circuit"); *Nat'l City Lines*, 687 F.2d at 1135 (Arnold, J., dissenting) (explaining that "the mere filing of a motion in a federal court seeking to enjoin state-court proceedings should [not] in and of itself deprive later filed state-court action of the protection of § 2283").

As always, we turn first to the plain language of the statute to determine its meaning. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). The plain language of the Act clearly and unequivocally prohibits a federal court from granting "an injunction to stay proceedings in a State court." 28 U.S.C. § 2283. Of course, in order for the Act's bar to apply, proceedings in state court must have begun. *See Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965) (the Act does "not preclude injunctions against the institution of state court proceedings, but only bar[s] stays of suits already instituted"). But nothing in the Act confines its bar to situations in which the federal plaintiff requests

injunctive relief *after* the state suit has been filed. *See Royal Ins. Co.*, 3 F.3d at 885.

Courts must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). A court may not disregard the plain language of a statute unless a literal application of the statutory language "would lead to absurd results ... or would thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (internal quotation marks and citation omitted). Here literal application of the Act's language would neither thwart its purpose nor produce an absurd result. Quite the contrary, abiding by the statutory language clearly furthers the Act's purpose of avoiding "unseemly conflict between the state and the federal courts." *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971).

Moreover, the Supreme Court has directed that the Act, in particular, "is not a statute conveying a broad general policy for appropriate ad hoc application" but rather is "expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-16 (1955). Courts are not to "enlarge[]" these "exceptions ... by loose statutory construction." *Atl. Coast Line*, 398 U.S. at 287. Instead, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed ... to finally determine the controversy." *Id.* at 297.

The *Barancik* court acknowledged the Supreme Court directive that the Act "imposes an absolute ban, circumscribing the federal court's power to act unless a case falls within one of the explicit exceptions from its command." *Barancik*, 489 F.2d at 937. It also recognized that "[t]he mere fact that the federal complaint was filed

before the state proceeding was commenced is not sufficient to avoid the statutory bar." *Id.* at 936 (citing *Kline v. Burke Construction Co.*, 260 U.S. 226, 232 (1922)). *But see Nat'l City Lines*, 687 F.2d at 1127 (stating that the Act "is inapplicable when a federal court has first obtained jurisdiction of a matter in controversy by the institution of suit"). Nevertheless, the *Barancik* court concluded that "the mandatory prohibition in § 2283 against injunctions staying state court proceedings does not apply to state actions commenced after a motion for injunctive relief is filed in the federal court." *Barancik*, 489 F.2d at 938.

The *Barancik* court advanced several policy concerns in support of its holding. For example, it worried that "[u]nless the applicability of the statutory bar is determined by the state of the record at the time the motion for an injunction is made, a litigant would have an absolute right to defeat a well-founded motion by taking the very step the federal court was being urged to enjoin." *Id.* at 937. But a federal court can eliminate this problem by issuing a temporary restraining order against the filing of a state court suit while considering a motion for a preliminary injunction seeking such relief. *See Royal*, 3 F.3d at 884; *see also Dombrowski*, 380 U.S. at 484 n.2 (noting that the Act does not prevent a federal court from restraining a party from instituting state proceedings). The *Barancik* court feared that such reliance on temporary restraining orders "might encourage the liberal granting of the kind of protective orders the statute was intended to prevent." *Barancik*, 489 F.2d at 938. However, the basic harm the statute was intended to prevent was not the liberal granting of protective orders, *per se*, but the "needless friction between state and federal courts." *Mitchum v. Foster*, 407 U.S. 225, 233 (1972) (internal quotation marks and citation omitted). Temporarily staying a potential state suit before it is filed so that an anti-suit injunction can be considered

would seemingly create significantly less friction than allowing a state suit to be commenced, only to enjoin it after it is filed.

The *Barancik* court also suggested that its ruling had "the salutary advantage of discouraging the unseemly race to the state courthouse ... while the federal court had under consideration a motion for a status quo order." *Barancik*, 489 F.2d at 935 n.5. But by hinging the applicability of § 2283 on whether the state or federal suit is commenced first, the *Barancik* rule creates a race to the courthouse of its own. *See Roth*, 583 F.2d at 533 (noting that the *Barancik* rule "merely moves the finish line"). Even worse, following *Barancik* would permit a federal court plaintiff who wins this race, to "unilaterally ... nullify the effectiveness of" the Act with the "mere application for injunctive relief." *Standard Microsystems*, 916 F.2d at 62; *see also* Diane P. Wood, *Fine-tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 B.Y.U. L. Rev. 289, 312 (1990) (arguing that the *Barancik* court's result does not seem "in line with the statute" because the "Act would become too easy to evade in many cases if the timing of the request for the injunction became the dispositive factor").

Although we recognize the legitimacy of the concerns raised by the Seventh Circuit in *Barancik*, the exception it created to meet these concerns poses its own problems. Moreover, even if application of the *Barancik* holding would result in better policy in the eyes of some, this is not the course Congress has chosen in the Act; views as to good policy cannot overcome a clear statutory directive. *See, e.g., Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000) (noting that "our job is to determine the meaning of the statute passed by Congress, not whether wisdom or logic suggests that Congress could have done better"). Therefore, we hold that the Act's prohibition on enjoining state court proceedings applies to any such proceeding

pending at the time the federal court *acts* on the request for injunctive relief, regardless of when the state court action was filed. Since the California proceeding was clearly pending at the time the district court acted on Denny's request for injunctive relief, the Act bars the relief Denny's requested.

Because the Act rendered the district court powerless to issue any of the relief Denny's requested, *see supra* n.8, its complaint should have been dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Accordingly, we vacate the judgment of the district court dismissing for lack of personal jurisdiction and remand with instructions to enter an order dismissing the case for failure to state a claim upon which relief can be granted.[10]

IV.

For the foregoing reasons, the judgment of the district court is

VACATED AND REMANDED.

WILLIAMS, Circuit Judge, concurring in part and concurring in the judgment in part:

At the outset, I concur completely in the majority's jurisdictional analysis. Having concluded that the district court had personal jurisdiction over the California state officials, this case requires our court to weigh in on two separate issues related to the Anti-Injunction Act that have divided the Courts of Appeals. I concur in the opinion of the court that the plain language of the Anti-Injunction Act bars an injunction in this case, unless one of its exceptions applies. In addition, because I believe that the judgment of

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[10] Given our holding, we need not address the Commissioner's contention that *Younger* abstention also compels dismissal of Denny's suit.

the court is compelled by our prior decision in *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995), I concur in the judgment that ERISA does not authorize an injunction of state court proceedings in this case. I write separately to highlight some of my concerns with these latter two issues.

First, I address the application of the Anti-Injunction Act (AIA) to state proceedings filed after federal proceedings are filed. The plain language of the Anti-Injunction Act prohibits injunctions "to stay proceedings in a State court." 28 U.S.C.A. § 2283 (West 1994). Nothing in this language limits the prohibition to state actions filed before the federal action is filed. Moreover, interpreting a predecessor statute to the AIA, the Supreme Court held in *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), that the predecessor statute barred the federal court from enjoining a state court action that was filed *after* the commencement of the federal court action. As my colleagues note, *ante* at 14, we may not disregard the plain language of a statute unless a literal application would lead to absurd results or would thwart the statute's obvious purpose. Although I agree with many of the concerns expressed by then-Judge Stevens in *Barancik v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir. 1973), especially the fear that our holding will pressure federal courts to grant temporary restraining orders, *see id.* at 938, I do not believe that applying the AIA to later-filed state court proceedings leads to absurd results or thwarts the obvious purpose of the AIA. Accordingly, I agree with my colleagues that we are bound by the plain language of the statute and that the plain language of the AIA bars an injunction in this case, unless one of its exceptions applies.*

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* I note that the facts of this case suggest a particularly troubling scenario. For example, even had Denny's requested a temporary restraining order against the filing of state court proceedings, the district

Second, application of the AIA's "expressly authorized by Act of Congress" exception to this case also presents some very interesting issues. We addressed a similar issue in *Employers Resource Management*, and held that "§ 1132(a) of ERISA does not operate as an automatic exception to the Anti-Injunction Act." *Employers Res. Mgmt.*, 65 F.3d at 1129. Because the Supreme Court in *Mitchum v. Foster*, 407 U.S. 225 (1972), held that 42 U.S.C.A. § 1983 was an expressly authorized exception to the AIA, we compared ERISA to § 1983. *Id.* at 1131. In making this comparison, we employed broad language that addressed ERISA as a whole. For example, we concluded that ERISA did not "create[] the type of 'unique' federal right or remedy that was at issue in *Mitchum* 's consideration of 42 U.S.C. § 1983" and that "[a] distrust of state courts did not play the same role in the development of ERISA as it did in the formation of § 1983." *Id.* Thus, we concluded that "[t]he ERISA statutory scheme is not sufficiently analogous to the scheme developed under § 1983 for us to extend *Mitchum* into the ERISA setting." *Id.*

Despite this broad language, other passages from our opinion reflect a belief that ERISA might be an "expressly authorized" exception to the AIA, and for that reason I do not join footnote 9 of the majority's opinion. For example, we repeatedly mentioned that ERISA is not an "automatic exception" to the AIA—the negative inference being that ERISA could be an exception under certain circumstances. *See id.* at 1129, 1132, 1137. In addition, in distinguishing a case from another circuit, we noted that "[e]ven § 1132 of

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court likely would have denied it based on the erroneous belief that it lacked personal jurisdiction. If so, the California state officials still would have been able to file their state court action, which we now hold cannot be enjoined by the federal court. In such a circumstance, the applicability of the AIA hinges entirely on the fortuity of the district court's erroneous procedural ruling.

ERISA, *which appears to create an exception to the Anti-Injunction Act*, could not be read as making *the mere filing of a state court proceeding* a violation of ERISA." *Id.* at 1133 (emphases added). Although the opinion is not entirely clear, one possible exception could exist where a plan fiduciary could show that it would be unable to carry out its responsibilities under ERISA if it were subjected to state laws. *Cf. id.* at 1132 (noting that "ERM has never suggested that it will be unable 'to carry out its responsibilities under ERISA' if it is subjected to Virginia insurance law"). If ERISA was an "expressly authorized" exception to the AIA in such circumstances, then the AIA likely would not apply to this case as Denny's has argued emphatically that it will be unable to carry out its responsibilities under ERISA if it is subjected to California labor law.

Were we writing on a clean slate, I might conclude that ERISA should be an exception to the AIA in all cases where the plan fiduciary seeks injunctive relief against state officials who are trying to impose state law or regulations on an ERISA plan. That option, however, is not available to us after *Employers Resource Management*, because in that case, Virginia was attempting to apply its insurance laws to an ERISA plan. Thus, after *Employers Resource Management*, we are left with binding circuit precedent holding that at least one ERISA case is subject to the strictures of the AIA.

Because of the same conflicting passages that are quoted above, however, I do not believe that *Employers Resource Management* answers the question of whether its holding necessarily extends to all ERISA cases (i.e., a categorical approach), or if instead we should apply a case-by-case approach to determine if ERISA is an "expressly authorized" exception under the circumstances of each particular case. I note that the majority in footnote 9 implicitly has adopted a categorical approach and extended

Employers Resource Management to all ERISA cases. *See ante* at 12 n.9; *see also Total Plan Services, Inc. v. Texas Retailers Assoc., Inc.*, 925 F.2d 142 (5th Cir. 1991) (holding that § 1132(a)(3), which authorizes federal courts to "enjoin any act ... which violates" ERISA, is not an "expressly authorized" exception to the AIA because "the mere filing of a state court proceeding [is not] a 'violation' of ERISA"). Some other circuits implicitly have adopted a case-by-case approach. *See General Motors v. Buha*, 623 F.2d 455 (6th Cir. 1980) ("When a district court finds that an action in state court will have the effect of making it impossible for a fiduciary of a pension plan to carry out its responsibilities under ERISA, the anti-injunction provisions of § 2283 do not prohibit it from enjoining the state court proceedings."); *United States Steel Corp. Plan for Employee Ins. Benefits v. Musisko*, 885 F.2d 1170 (3d Cir. 1989) (distinguishing *Buha* on its facts based on the "important factual differences between that case and this one—particularly in the type of plan and the nature of the relationship between the federal plaintiffs and their insurer").

The Supreme Court has not spoken clearly as to whether the AIA should be interpreted using a categorical or a case-by-case approach. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). In *Vendo*, the Court held that § 16 of the Clayton Act did not carve out an exception to the AIA. In a plurality opinion, then-Justice Rehnquist, joined by Justice Stewart and Justice Powell, focused solely on § 16 of the Clayton Act—its text and legislative history—to determine that the "expressly authorized" exception did not apply. *Id.* at 631-41 (Rehnquist, J.). After recognizing that the plain language of § 16 of the Clayton Act, like ERISA, authorized injunctions, but did not mention state-court proceedings, Justice Rehnquist noted that

> in *Mitchum*, absence of express language authorization for enjoining state-court proceedings

> in § 1983 actions was cured by the presence of relevant legislative history. In this case, however, neither the respondents nor the courts below have called to our attention any similar legislative history in connection with the enactment of § 16 of the Clayton Act.

Id. at 634. Thus, he concluded, § 16 of the Clayton Act is never an exception to the AIA. *Id.* at 641 (noting that to be an "expressly authorized" exception to the AIA, "the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding. Section 16 of the Clayton Act ... is clearly not such an Act."). This "categorical" approach mirrors the approach taken by the Court in *Mitchum v. Foster*, 407 U.S. 225, 238-43 (1972), when it held that § 1983 fell within the "expressly authorized" exception.

In contrast, Justice Blackmun, joined by Chief Justice Burger, in his concurrence in the result in *Vendo*, applied a case-by-case approach. *See Vendo*, 433 U.S. at 643 (Blackmun, J., concurring in the result) (noting that he "do[es] not agree that [it] is invariably the case" that § 16 of the Clayton Act is not an "expressly authorized" exception to the AIA). In Justice Blackmun's view, § 16 of the Clayton Act is an exception to the AIA if the "currently pending state-court proceedings ... are themselves part of a 'pattern of baseless, repetitive claims' that are being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings." *Id.*

Justice Stevens, joined by Justice Brennan, Justice White, and Justice Marshall, dissented. Justice Stevens would have held that § 16 of the Clayton Act "is an Act of Congress which expressly authorizes an injunction against a state-court proceeding which violates the antitrust laws"

even though there is no mention of state-court proceedings or the AIA in § 16. *Id.* at 654 (Stevens, J., dissenting).

I note that the categorical approach employed by Justice Rehnquist in *Vendo* has much to recommend it. A categorical approach seems to be more consistent with the statutory language of the AIA, which speaks of "Act[s] of Congress" rather than the circumstances of particular cases. Moreover, a case-by-case approach likely would be difficult to administer. For example, every plan fiduciary would undoubtedly claim that it would be unable to carry out its responsibilities under ERISA if the state court proceeding continued, thus, in effect creating an exception for all ERISA fiduciary cases.

In any event, we need not resolve that issue here because under either approach ERISA would not be an "expressly authorized" exception to the AIA in the circumstances of this case. If we apply a categorical approach, then we are hemmed in by our prior decision in *Employers Resource Management.* If, instead, we apply a case-by-case approach, the parties have not pointed us to anything in the text or legislative history of ERISA indicating that Congress intended to carve-out this type of case from the run-of-the-mill ERISA case. Accordingly, I concur in the majority's judgment that ERISA does not authorize the requested relief in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
SPARTANBURG DIVISION

DENNY'S, INC., IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INC., VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S, INC. EMPLOYEE BENEFITS TRUST; AND DENNY'S, INC. EMPLOYEE BENEFITS TRUST,
PLAINTIFFS,

VS.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS AND ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,
DEFENDANTS

CA No. 7:02-2968-20.

[FILED]
[FEB 27, 2003]
[LARRY W. PROPES, CLERK]
[U.S. DISTRICT COURT]

[ENTERED]
[FEB 27, 2003]

ORDER

This matter is before the court on the defendants' motion to dismiss pursuant to Rule 12(b)(2), (3), and (6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the court grants the defendants' motion to dismiss.

I. PROCEDURAL AND FACTUAL BACKGROUND

Denny's, Inc. ("Denny's") is a national restaurant chain that employs approximately thirty thousand people. Denny's, with its principal place of business in Spartanburg, South Carolina, maintains and administers the Denny's, Inc. Vacation Pay Plan ("Plan") and the Denny's, Inc. Employee Benefits Trust ("Trust"). Andrew F. Green ("Green") is the trustee of the Trust. The Plan and the Trust are located and administered in South Carolina.

The Plan provides that a salaried employee cannot use vacation days until after the completion of six months of continuous service with Denny's. (Compl. at 6.) Similarly, an hourly employee cannot use vacation days until the completion of one year of continuous service. (*Id.* at 6-7.) The plaintiffs allege that the Plan and the Trust are governed by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C § 1001, *et seq.* California Labor Code Section 227.3 is in conflict with the Plan's vacation policy. California Labor Code Section 227.3 states:

> Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination.

Cal. Lab. Code § 227.3.

On July 11, 2001, the plaintiffs received a letter from Susan A. Dovi ("Dovi"), a staff attorney working for defendants Chuck Cake ("Cake"), Acting Director of the

California Department of Industrial Relations, and Arthur Lujan ("Lujan"), Labor Commissioner of the State of California, in which Dovi states the Plan and the Trust are not employee welfare benefit plans covered under ERISA and that they violate section 227.3 of the California Labor Code. (Compl. at 6.) In the July 11, 2001, letter Dovi further states that the California Department of Labor Standards Enforcement intends to file a lawsuit "seeking unpaid vacation benefits and penalties for all former California employees of Denny's for a four-year period of time." (*Id.*)

On September 6, 2002, the plaintiffs filed the instant lawsuit seeking a declaratory judgment and injunctive relief. Specifically, the plaintiffs ask the court to declare that the Plan and the Trust are governed by ERISA and that ERISA preempts section 227.3.[11] (Compl. at 10.) In addition, the plaintiffs seek preliminary and permanent injunctive relief barring the defendants from taking action to enforce section 227.3 against Denny's. (*Id.*) On September 24, 2002, the defendants filed a claim against Denny's in California state court seeking to enforce section 227.3.

II. LEGAL DISCUSSION

Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, the defendants move to dismiss for lack of personal jurisdiction. Specifically, the defendants challenge the application of 29 U.S.C. § 1132(e)(2) as the basis for personal jurisdiction. "[C]ourts address issues relating to

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[11] In addition, the plaintiffs ask the court to declare that a prior order of the United States District Court in *California Hosp. Ass'n v. Henning*, 569 F. Supp. 1544 (C.D. Cal. 1983), precludes the defendants from enforcing section 227.3 and from asserting that ERISA does not preempt section 227.3. Because the court's resolution of the instant motion does not involve the plaintiffs' request with regard to *Henning*, the court merely notes this prayer for relief.

personal jurisdiction before reaching the merits of the plaintiff[s'] claims." *Sadighi v. Daghighfekr*, 36 F. Supp. 2d 267, 270 (D.S.C. 1999). When personal jurisdiction is challenged by the defendant, a plaintiff has the burden of showing that jurisdiction exists. *See In re Celotex Corp.*, 124 F.3d 619, 628 (4th Cir. 1997). "When a district court decides a pretrial personal jurisdiction dismissal motion without an evidentiary hearing, [p]laintiffs need only prove a *prima facie* case of personal jurisdiction." *Sadighi*, 36 F. Supp. 2d at 270. In making this determination, the court looks to the complaint and any supporting affidavits. *See In re Celotex Corp.*, 124 F.3d at 628. Furthermore, the court will construe factual allegations in favor of the plaintiff. *See id.* While most personal jurisdiction challenges involve a factual analysis, the personal jurisdiction challenge in this case turns on a legal determination.

The analysis begins with ERISA § 502(e)(2), which states:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1132(e)(2). The interpretation of this statute is not in dispute.[12] Instead, the question before the court is

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[12] In *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit states: "Where ... Congress has authorized nationwide service of process ... so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant." In this context, due process is satisfied if an exercise of personal jurisdiction would not be of "such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion

whether ERISA § 502(e)(2) applies to this case. If it does not, it seems apparent that the court cannot exercise personal jurisdiction over the defendants.[13]

As the United States Court of Appeals for the Sixth Circuit noted, "[p]ersonal jurisdiction under [ERISA § 502(e)(2)] depends on subject matter jurisdiction under [ERISA § 502(a)(3)]." *NGS Am., Inc. v. Jefferson*, 218 F.3d 519, 524 (6th Cir. 2000).[14] In other words, ERISA § 502(e)(2) applies and therefore personal jurisdiction exists only if the plaintiffs' claims fall within ERISA's civil enforcement provision, specifically ERISA § 502(a)(3).[15] ERISA § 502(a)(3) states:

> A civil action may be brought—by a ... fiduciary ... to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or ... to obtain other appropriate equitable relief ... to redress such violations or ... to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). Assuming for this analysis the plaintiffs are ERISA fiduciaries, the question becomes whether the requested injunctive and declaratory relief falls

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of *in personam* jurisdiction." *Id.* at 627. In addition, judicial efficiency is considered in this analysis. *See id.*

[13] Without the benefit of ERISA § 502(e)(2), the plaintiffs are forced to satisfy the traditional two-prong test for personal jurisdiction. *See* generally *Int'l Shoe Co v. Washington*, 326 U.S. 310 (1945). Because there is nothing in the record to even suggest the plaintiffs could establish the defendants had minimum contacts with South Carolina, the court declines to request additional briefing on this issue.

[14] As in *Jefferson*, the plaintiffs assert a cause of action pursuant to ERISA § 502(a)(3). (Compl. at 3.)

[15] ERISA's civil enforcement provision is ERISA § 502(a). ERISA § 502(a) creates "a series of express causes of action in favor of participants, beneficiaries, and fiduciaries of ERISA-covered plans, as well as the Secretary of Labor." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983).

within ERISA § 502(a)(3). The plaintiffs, as ERISA fiduciaries, are requesting the court to declare that section 227.3 is preempted by ERISA and to therefore enjoin state officials from enforcing the provision. The question is whether such an action falls within ERISA § 502(a)(3).[16] The court finds that it does not.

An analysis of whether the plaintiffs' claims fall within ERISA § 502(a)(3) begins with a discussion of subject matter jurisdiction. ERISA § 514 states, subject to exceptions, that all state laws which relate to an ERISA plan are preempted by ERISA. *See* 29 U.S.C. § 1144. If the plaintiffs raise ERISA § 514 as a defense in the California state action, the plaintiffs will not be able to remove the case to federal court. *See Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 186-87 (4th Cir. 2002) (holding that the doctrine of complete preemption, not ERISA § 514, gives rise to removal jurisdiction). Therefore, the question is whether raising the ERISA § 514 defense in the form of a declaratory judgment action changes this analysis. Specifically, the court must determine whether it has subject matter jurisdiction over the case and personal jurisdiction over the defendants.

We start with a review of the United States Supreme Court's opinion in *Franchise Tax Board.* In *Franchise Tax Board*, the Franchise Tax Board of California filed suit in state court against the Construction Laborers Vacation Trust for Southern California ("CLVT") to enforce certain California tax provisions and alleged a claim pursuant to the California Declaratory Judgment Act seeking a declaration that ERISA did not preempt the California tax laws at

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[16] While the court notes that the plaintiffs ask the court to declare the Plan and the Trust are an employee welfare benefit plan under ERISA, the court finds that the crux of the plaintiffs' requested declaratory judgment relief is the issue of preemption and, more specifically, the application of ERISA § 514.

issue. 463 U.S. at 5-7. In that case, the CLVT was "unquestionably an employee welfare benefit plan" under ERISA. *Id.* at 5. The case was removed to federal court, and on appeal the United States Supreme Court determined that removal jurisdiction did not exist. *See id.* at 4.

The Supreme Court noted "the propriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States" and stated that anticipation of a federal defense does not confer federal question jurisdiction. *Id.* at 8, 10. Because both of the plaintiff's causes of action arose under state law, the Court determined that "original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law." *Id.* at 13. Discussing the declaratory judgment cause of action, the Court stated: "Whereas the question of federal pre-emption is relevant to appellant's first cause of action only as a potential defense, it is a necessary element of the declaratory judgment claim." *Id.* at 14. The Court went on to state that "it is clear on the face of its well-pleaded complaint that [the Franchise Tax Board] may not obtain the relief it seeks in its [declaratory judgment] cause of action ... without a construction of ERISA and/or an adjudication of its pre-emptive effect and constitutionality—all questions of federal law." *Franchise Tax Board*, 463 U.S. at 14

After holding that the doctrine set forth in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), applied to state declaratory judgment actions, the Court applied *Skelly Oil Co.* to the facts of the case. *Franchise Tax Board*, 463 U.S. 15-22. "*Skelly Oil* has come to stand for the proposition that 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to

a state created action, jurisdiction is lacking." Id. at 16 (internal quotation omitted).

In a footnote, the Court went on to quote dicta from its opinion in *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952):

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

Franchise Tax Board, 463 U.S. at 16 n.14 (quoting *Wycoff*, 344 U.S. at 248.) "Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Id.* at 19.

However, in applying the rule of *Skelly Oil* to the facts in *Franchise Tax Board*, the Court stated:

> There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly

> conflicting federal law. States are not significantly prejudiced by an inability to come to federal court for a declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the pre-emption questions such enforcement may raise are tested there. The express grant of federal jurisdiction in ERISA is limited to suits brought by certain parties, ... as to whom Congress presumably determined that a right to enter federal court was necessary to further the statute's purposes. It did not go so far as to provide that any suit *against* such parties must also be brought in federal court when they themselves did not choose to sue. The situation presented by a State's suit for a declaration of the validity of state law is sufficiently removed from the spirit of necessity and careful limitation of district court jurisdiction that informed our statutory interpretation in *Skelly Oil* ... to convince us that, until Congress informs us otherwise, such a suit is not within the original jurisdiction of the United States district courts. Accordingly, the same suit brought originally in state court is not removable either.

Id. at 21-22. While this language is not particularly relevant because a state is not the plaintiff in the case currently before the court, it leads to the Court's discussion of the doctrine of complete preemption.

"It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). A federal defense does not give rise to federal question jurisdiction and therefore

cannot be the basis for removal. *See id.* Federal preemption is ordinarily a federal defense. *See id.* Congress, however, can choose to "completely preempt a particular area [so] that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64. Complete preemption forms an exception to the well-pleaded complaint rule. *See Lancaster v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 958 F. Supp. 1137, 1143 (E.D. Va. 1997) ("[T]he doctrine of 'complete preemption' ... permits removal of an otherwise non-federal action if the asserted state claims conflict with a federal statutory scheme.").

In the context of ERISA, the doctrine of complete preemption dictates that "any state action coming within the scope of § 502(a) of ERISA would be removable to federal district court, even if an otherwise adequate state cause of action were pleaded without reference to federal law." *Franchise Tax Board*, 463 U.S. at 24; *see also Metropolitan Life*, 481 U.S. at 66. In *Franchise Tax Board*, the Court held that the Franchise Tax Board's action for declaratory judgment relief did not fall under ERISA § 502(a) and therefore was not removable on the basis of complete preemption. This conclusion was based specifically on the language of ERISA § 502(a). For these reasons, the Court found that it lacked removal jurisdiction and remanded the case to state court.

In an opinion issued on the same day, the Supreme Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 92 (1983), reviewed declaratory judgment actions by various employers against state agencies seeking a declaration that the state Human Rights Law was preempted by ERISA. In doing so, the Court distinguished *Franchise Tax Board* by stating:

> The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust* ... does

> not call into question the lower court's jurisdiction to decide these cases. Franchise Tax Board was an action seeking a declaration that state laws were *not* preempted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* preempted by ERISA, as well as declarations that those laws are pre-empted.

Id. at 96 n. 14. The Court also stated:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. (internal quotation omitted).

In *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 991 (4th Cir. 1990), the Fourth Circuit stated "[w]e read *Franchise Tax Board* and *Delta Air Lines* to provide at a minimum, ... for federal question jurisdiction under ERISA where the issue presented, whether it be the creation of federal common law or the interpretation of a specific ERISA provision, is of central concern to the statute." *Id.* (internal citation and quotation omitted). In other words, the Fourth Circuit determined that the court had jurisdiction over the claims in the case even though they fell outside of ERISA's civil enforcement provision because ERISA's federal common law establishes 'arising under' jurisdiction in limited circumstances. *See id. But see Darcangelo*, 292 F.3d at 187 ("[W]hen ERISA is simply asserted as a defense to a state law claim, the state law

claim is not converted into a federal claim and there is no federal question [jurisdiction]."). *See generally Metropolitan Life*, 481 U.S. at 66 (holding that claims which fall within ERISA § 502(a) are removable to federal court).

Assuming the court has subject matter jurisdiction based on 28 U.S.C. § 1331 and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, rather than ERISA § 502(a), the court is still faced with the issue of personal jurisdiction.[17] The answer to this question depends solely on whether the plaintiffs' claims fall within ERISA's civil enforcement provision. As fiduciaries, the plaintiffs are proper parties to bring suit under ERISA § 502(a)(3). Further, in addition to providing for injunctive relief, ERISA § 502(a)(3) "has been interpreted as creating a cause of action for a declaratory judgment." *Jefferson*, 218 F.3d at 529 (internal quotation omitted). The focus, therefore, is on the nature of the relief and the question is whether a suit based on ERISA § 514 enforces ERISA. The court in *Jefferson* found that it did not, and the court agrees.

"On its face, [ERISA § 514] does not prohibit filing a state law claim preempted by ERISA in state court, nor does it seem readily enforceable by injunctive or declaratory relief." *Id.* As the *Jefferson* court notes, a variety of provisions of ERISA "lend themselves to 'enforcement' in an action brought under [ERISA § 502(a)(3)] because they place specific duties on specific persons. [ERISA § 514], by contrast, does not." *Id.* (internal quotation omitted). The *Jefferson* court goes on to state:

> The ERISA provision that [the plaintiff] purports to be enforcing is [ERISA § 514], a provision that

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[17] The defendants also cite *Int'l Assoc. of Entrepreneurs of America v. Angoff*, 58 F.3d 1266 (8th Cir. 1995), in support of their motion to dismiss. Although thought provoking, Angoff is not directly relevant to whether the plaintiffs' claims fall within ERISA's civil enforcement provision, the lynchpin of personal jurisdiction in this case.

> this court has determined does not create a federal cause of action itself. It would thus be anomalous if an action to enforce [ERISA § 514] were a federal cause of action [under ERISA § 502(a)]. Given that [the defendant] bringing a state court suit does not violate [ERISA § 514], [the plaintiff's] action to block that suit cannot enforce [ERISA § 514]. .... [The defendant] has not violated the Plan or ERISA by merely filing suit, so there is nothing for [the plaintiff] to enforce under the aegis of [ERISA § 502(a)(3)]. ... If ERISA does not prohibit the *filing* of preempted claims in state court, then injunctive and declaratory relief against those state court proceedings is not available under ERISA.

Id. at 529-30. *But see Thiokol Corp. v. Dep't of Treasury, State of Michigan, Revenue Div.*, 987 F.2d 376, 380 (6th Cir. 1993) (holding that a claim by plaintiffs for "injunctive or declaratory relief to prevent future collection" of tax levies falls under ERISA's civil enforcement provision).

Applying the *Jefferson* court's reasoning to the facts in this case leads the court to conclude that the plaintiffs' claims do not fall under ERISA § 502(a)(3). This conclusion is not changed by the fact that the plaintiffs ask both for a declaration that the Plan and the Trust are employee welfare benefit plans under ERISA and that section 227.3 is preempted. It is important to note in distinguishing *Thiokol* that the plaintiffs in this case ask for "preliminary and permanent injunctions barring Defendants from taking any action to enforce California law against Plaintiffs with regard to the Plan and the Trust." (Compl. at 10.) In *Thiokol*, the plaintiffs asked for a declaration that certain tax levies were preempted by ERISA and for an injunction prohibiting the collection of certain taxes. 987 F.2d at 378. *Thiokol* held only that the plaintiffs' claim for injunctive

relief fell under ERISA.[18] The plaintiffs in this case are not asking for an injunction against the enforcement of section 227.3 but for an injunction preventing the defendants from bringing suit against the plaintiffs. In essence, the plaintiffs are asking the court to enforce ERISA § 514, a claim which does not fall within ERISA § 502(a)(3).

The court recognizes that the facts of *Jefferson* are easily distinguishable from the facts at hand. In *Jefferson*, the plaintiff, a third-party ERISA plan administrator, in anticipation of a malpractice suit by an ERISA beneficiary, sued the beneficiary seeking a declaration that any state malpractice claims would be preempted by ERISA. In this case, the plaintiffs, in anticipation of a lawsuit to enforce a state statute, filed suit asking the court to declare that the state statute is preempted by ERISA. However, the court finds that any factual distinction does not affect the application of the *Jefferson* Court's reasoning.

The court also finds *Gulf Life Ins. Co. v Arnold*, 809 F.2d 1520 (11th Cir. 1987), to be instructive. In *Gulf Life Insurance*, after an ERISA beneficiary filed a claim for benefits, Gulf Life Insurance Company filed suit seeking a declaration with regard to its liability. In doing so, Gulf Life Insurance Company invoked ERISA's nationwide service of process provision to obtain personal jurisdiction. In reviewing personal jurisdiction, the United States Court of Appeals for the Eleventh Circuit noted that "nationwide service of process is available only if the suit is 'an action under *this subchapter*.'" *Gulf Life*, 809 F.2d at 1523. The *Gulf Life* court held that the plaintiff's declaratory judgment action was neither a suit for equitable relief nor a suit to enforce the plan or subchapter. *See id.* "The purpose

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[18] Because the Eleventh Amendment barred the suit with regard to the first part of plaintiffs' claim, the court did not reach the issue of whether that claim was brought under ERISA.

essential to section 1132(a)(3)(B) is to enforce the terms of the plan or ERISA ... ." *Id.*

"Moreover, an action to enforce means an action to compel someone to do something or not to do something, such as make contributions, that ERISA or the plan requires be done or not done." *Id.* "[C]ivil action under ERISA are limited only to those parties and actions Congress specifically enumerated in section 1132." *Id.* at 1524. The plaintiffs argue and the court agrees that the facts of *Gulf Life* are easily distinguishable from this case. However, as in *Jefferson*, the reasoning that claims must fall within ERISA's civil enforcement provision in order to be subject to ERISA § 502(e)(2) still applies.

After review, the court determines that while it may have subject matter jurisdiction over the case, it lacks personal jurisdiction over the defendants. Specifically, the court finds that ERISA § 502(e)(2) cannot be used to exercise personal jurisdiction over the defendants because the plaintiffs' claims do not fall within ERISA's civil enforcement provision. Because it is clear from the record before the court that the plaintiffs cannot establish a *prima facie* case of personal jurisdiction without ERISA § 502(e)(2), the court grants the defendants' motion to dismiss for lack of personal jurisdiction.

Therefore, it is

ORDERED that the defendants' motion to dismiss for lack of personal jurisdiction is granted.[19]

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[19] Because the court dismisses the case for lack of personal jurisdiction, the court declines to address the defendants' remaining arguments.

IT IS SO ORDERED.

/s/ Henry M. Herlong, Jr.
Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
February 27, 2003

Labor Commissioner's Office
Attn: Hipshman, Anne
Department of Industrial Relations
455 Golden Gate Ave. Fl 9
San Francisco, CA 94102-___

Advantica Restaurant Group, Inc., a Delaware Corporation

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Labor Commissioner, State of
Plaintiff(s)

vs.

Advantica Restaurant Group,
Defendant(s)

(Abbreviated Title)

No. 2002065951

Order

Motion to Stay Proceedings Granted

The Motion to Stay Proceedings was set for hearing on 01/06/2003 at 09:00 AM in Department 31 before the Honorable James A. Richman. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: Plaintiff and Opposing Party Labor Commissioner, State of California; Department of Industrial Relations appeared by counsel Miles E. Locker. Defendants Dennys Corporation and Dennys Inc. appeared by counsel Mark S. Spring.

The motion was argued and submitted, and the court orders the tentative ruling affirmed as follows:

Denny's Corporation's (Formerly Known as Advantica Restaurant Group, Inc.) and Denny's Inc.'s Notice of Motion for Stay of Proceedings is GRANTED pending resolution of a related case, Denny's Inc., et al. v. Chuck Cake, et al., case number 7-02-2968-20.

Dated: 01/06/2003

/s/ James A. Richman

Judge James A. Richman

Labor Commissioner's Office
Attn: Hipshman, Anne
Department of Industrial Relations
455 Golden Gate Ave. Fl 9
San Francisco, CA 94102-___

Advantica Restaurant Group, Inc., a Delaware Corporation

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Labor Commissioner, State of Plaintiff/Petitioner(s) vs. Advantica Restaurant Group Defendant/Respondent(s) (Abbreviated Title)	No. 2002065951 Application Re: Stay Denied

IT IS ORDERED that the Plaintiff's Application Re: Lifting Stay is denied without prejudice. A noticed motion will be required.

Dated: 07/22/2003

/s/ James A. Richman
Judge James A. Richman

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1326
CA-02-2968-7-20

FILED: MAY 7, 2004

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,
PLAINTIFFS-APPELLANTS,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,
DEFENDANTS-APPELLEES.

AMERICAN ASSOCIATION OF RETIRED PERSONS,
AMICUS SUPPORTING APPELLEE.

ON PETITION FOR REHEARING AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the Panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge Williams and Judge Motz.

For the Court,

/s/ Patricia S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA,
SPARTANBURG DIVISION

DENNY'S, INC., IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INC., VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S, INC. EMPLOYEE BENEFITS TRUST; AND DENNY'S, INC. EMPLOYEE BENEFITS TRUST,
PLAINTIFFS,

VS.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS AND ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,
DEFENDANTS

CA No. 7:02-2968-20.

[FILED]
[MAY 27, 2004]
[LARRY W. PROPES, CLERK]
[U.S. DISTRICT COURT]

[ENTERED]
[MAY 27, 2004]

ORDER

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit. On April 12, 2004, the Fourth Circuit vacated the court's order granting the defendants' motion to dismiss for lack of personal jurisdiction. *See Denny's Inc. v. Cake*, No. 03-1326,

2004 WL 765022, at *5 (4th Cir. Apr. 12, 2004). The Fourth Circuit also remanded for entry of an order dismissing the complaint for failure to state a claim upon which relief can be granted. *Id.* at *9 (citing Fed. R. Civ. P. 12(b)(6)). Therefore, it is

ORDERED that the complaint is dismissed for failure to state a claim.

IT IS SO ORDERED.

/s/ Henry M. Herlong, Jr.
Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
May 27, 2004

28 U.S.C. § 2283

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

29 U.S.C. § 1001

§ 1001. Congressional findings and declaration of policy

* * *

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

* * *

29 U.S.C. § 1002

§ 1002. Definitions

For purposes of this subchapter:

* * *

(16) (A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with

respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

* * *

29 U.S.C. § 1104

§ 1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * *

29 U.S.C. § 1132 (West 1999 & Supp. 2004)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021 of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a

fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * *

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

* * *

29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date.

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt

under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

California Labor Code § 203

§ 203. Failure to make payment within required time; penalty; employee avoiding payment; limitation of actions.

If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. An employee who secretes or absents himself or herself to avoid payment to him or her, or who refuses to receive the payment when fully tendered to him or her, including any penalty then accrued under this section, is not entitled to any benefit under this section for the time during which he or she so avoids payment.

Suit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

California Labor Code § 227.3

§ 227.3. Vested vacation wages; payment upon termination

Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer

policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

(3)

No. 04-6

Supreme Court, U.S.
FILED
AUG 2 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

DENNY'S INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

Petitioners,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held (in conformity with the Second, Fifth and Sixth Circuits) that the Anti-Injunction Act ("AIA") barred the district court from enjoining Respondents' state court action when the district court had not issued an injunction prior to the filing of the state court action, where this holding can be supported on the alternative ground (in conformity with the First, Seventh and Eighth Circuits) that Petitioners failed to file a motion for injunctive relief prior to the filing of the state court action.

2. Whether the Fourth Circuit correctly held (in conformity with the Third and Fifth Circuits) that the Employee Retirement Income Security Act of 1974 ("ERISA") is not an "expressly authorized" exception to the AIA, where this holding can be supported on the alternative ground (in conformity with the Sixth Circuit) that under the facts of this case, Petitioners' ERISA action does not fall within this exception as the prosecution of the pending state action does not violate ERISA, and Petitioners can litigate their preemption defense in the state proceeding.

3. Whether the Fourth Circuit correctly held that the AIA barred Petitioners' claims for declaratory relief because otherwise the AIA would be reduced to a minor technicality.

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II. UNDER THE CRITERIA ESTABLISHED BY THIS COURT, AS APPLIED BY VIRTUALLY EVERY CIRCUIT, THE AVAILABILITY OF A STATE FORUM TO RAISE AN ERISA PREEMPTION DEFENSE PRECLUDES APPLICATION OF THE "EXPRESSLY AUTHORIZED" EXCEPTION TO THE ANTI-INJUNCTION ACT 10

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STATEMENT OF THE CASE

Denny's, a nationwide restaurant chain with its principal place of business in South Carolina, maintains the Denny's, Inc. Vacation Plan ("the Plan") and the Denny's, Inc. Employee Benefits Trust ("the Trust") for the stated purpose of providing vacation benefits to eligible employees. The Plan provides for a forfeiture of accrued vacation wages upon termination of employment unless the terminating employee has completed six months (for salaried employees) or one year (for hourly employees) of continuous service. Appendix to Petition at 2a.

The California Labor Commissioner is responsible for the investigation and adjudication of wage claims brought by employees against California employers. The Labor Commissioner also has statutory authority to file lawsuits against California employers for violations of California wage and hour laws. Appendix at 3.

On July 11, 2002, Denny's received a letter from an attorney at the California Department of Industrial Relations. The purpose of the letter was "to come to a global resolution" of issues raised by claims of former Denny's employees filed with the California Labor Commissioner. The attorney explained that Denny's policy requiring forfeiture of vacation wages when employees terminate prior to six months or one year of employment violated Cal. Labor Code §227.3. That statute provides that when "an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages" and further, "that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." Appendix to Petition at 3a.

The letter further noted that the Department had concluded that "Denny's method of funding its vacation pay plan constituted a payroll practice and the plan is not therefore an ERISA plan which preempts state enforcement laws." The letter recounted prior discussions and litigation between the parties on this issue, including a state court's refusal to grant summary judgment to Denny's on its preemption defense. Given the numerous claims filed with the Department, the attorney proposed that Denny's meet with the Labor Commissioner and discuss an "amicable resolution: to avoid "the time and expense of litigation." Otherwise, the Department would have "to file an action against Denny's to finally resolve this issue." *Ibid.*

In response, on September 6, 2002, Petitioners herein (Denny's, Inc., the Plan, the Trust, and Andrew F. Green, as trustee of the Trust) filed a complaint for declaratory and injunctive relief in federal court in South Carolina against the California Labor Commissioner and Department of Industrial Relations (collectively, "Commissioner"). In this complaint, Petitioners sought: (1) a declaration that the Plan and Trust constitute an ERISA plan; (2) a declaration that "ERISA preempts the California statutes, regulations, and any action or decision" of the Commissioner "having the effect of law that [the Commissioner] seek[s] to enforce against [Petitioners] based upon California law"; and (3) "[p]reliminary and permanent injunctions barring [the Commissioner] from taking any action to enforce California law against [Petitioners] with regard to the Plan and the Trust." Appendix to Petition at 3a-4a. After filing their complaint in the federal district court, Petitioners failed to file any application for a temporary

restraining order or any motion for the issuance of a preliminary injunction. Appendix at 22-25.

On September 24, 2002, eighteen days after Petitioners filed their complaint in the district court, the Commissioner filed an action against Denny's in California state court, for damages and injunctive relief. Specifically, the state court action contends that Denny's violated Cal. Labor Code §227.3 by forfeiting employees' accrued vacation. The state court action seeks payment of the unlawfully forfeited vacation wages and "waiting time penalties" pursuant to Cal. Labor Code §203. The Commissioner also asked the state court to order Denny's to cease and desist from violating the Labor Code. The state court action does not name or seek any recovery from any ERISA plan, trust, or trustee. Appendix at 12-19. In its answer to the state court action, Denny's alleged ERISA preemption as an affirmative defense. Appendix to Petition at 4a.

After filing the state court action, the Commissioner moved to dismiss the federal action, contending that the federal district court in South Carolina lacked personal jurisdiction over the California officials. Alternatively, the Commissioner contended that the Anti-Injunction Act ("AIA"), 28 U.S.C. §2283, and abstention based on *Younger v. Harris,* 401 U.S. 37 (1971), compelled dismissal. On February 27, 2003, the district court granted the Commissioner's motion, concluding it lacked personal jurisdiction over the Commissioner. The district court therefore did not reach any of the other grounds argued by the Commissioner. *Denny's, Inc. v. Cake*, 247 F.Supp.2d 813 (D.S.C. 2003).

Petitioners timely appealed to the United States Court of Appeals for the Fourth Circuit. In its decision, the

Fourth Circuit held that although the district court erred in that it could exercise personal jurisdiction over the Commissioner under 29 U.S.C. §1132(e)(2), Petitioners' federal court action was nonetheless barred by the AIA. Appendix to Petition at 1a-24a. Thereafter, petitioners filed for certiorari.

Concurrently, on July 2, 2004, the United States Department of Labor ("DOL") issued an advisory opinion letter, requested by Denny's, regarding the issue of whether its vacation pay program constituted an ERISA plan. The DOL concluded, on the facts provided to it by Denny's, that Denny's Vacation Trust is not an employee welfare benefit plan within the meaning of ERISA section 3(1), but rather, is "a mere pass-through vehicle for the employer's payment of ordinary vacation wages." Appendix at 32.

REASONS FOR DENYING THE PETITION

I. THERE IS NO RELEVANT SPLIT IN THE CIRCUITS, AS UNDER THE FACTS OF THIS CASE, EVERY CIRCUIT WOULD CONCLUDE THAT THE ANTI-INJUNCTION ACT APPLIES, EITHER BECAUSE THE DISTRICT COURT HAD NOT ISSUED AN INJUNCTION PRIOR TO THE FILING OF THE STATE ACTION, OR BECAUSE PETITIONERS HAD NOT FILED A MOTION FOR AN INJUNCTION PRIOR TO THE FILING OF THE STATE ACTION

The Anti-Injunction Act ("AIA") generally prohibits the federal courts from interfering with proceedings in the state courts:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. §2283.

The enumerated "exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988), citing *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970), and *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 514 (1955). "[A]n injunction staying state proceedings is proper only if it falls within one of the statutory exceptions[.]" *Ibid.* "On its face, the [AIA] is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. . . . [A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld." *Atlantic Coast Line, supra,* 398 U.S. at 286-287. "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Id.* at 296-297.

Of course, the AIA has been held inapplicable to federal injunctions issued prior to the institution of the state court action. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). This holding is founded upon the AIA's plain language, which prohibits "grant[ing] an injunction to stay proceedings in a state court." The AIA does not prohibit granting an injunction that enjoins the filing of a

threatened but not yet filed state court action, as in such a situation, there is no state "proceeding" that is stayed. Applying *Dombrowski* to the facts of this case, the AIA would not have prohibited the issuance of an injunction until Respondents filed the state court action on September 24, 2004.

Petitioners argued that even though no injunction issued prior to the filing of state court action, the fact that the federal case was filed prior to the filing of the state court action makes the AIA inapplicable. (Appendix to Petition, at 13-14a.) The Fourth Circuit rejected Petitioners' argument, and held that "the [AIA's] prohibition on enjoining state court proceedings applies to any such proceeding pending at the time the federal court *acts* on the request for injunctive relief, regardless of when the state court action was filed." (*Id.* at 17-18a.) Here, the fact that the district court hadn't acted on a request for injunctive relief prior to the filing of the state court action was not surprising, in that Petitioners had done nothing to require the district court to act on any such request. Petitioners filed no application for a temporary restraining order against the filing of state court proceedings, and no motion for an injunction. Thus, the gravamen of Petitioners' argument is that the mere filing of a federal complaint for injunctive relief is, in itself, sufficient to overcome the AIA as to any subsequently filed state court action. There is no conflict among the circuits on this issue. Not a single circuit has held that the date of filing a federal complaint for injunctive relief is determinative as to whether the applicability of the AIA as to a subsequently filed state court action.

Prior to the Fourth Circuit's decision below, three other circuits have held that the determination as to

whether the AIA applies to prohibit enjoining a subsequently filed state court action is based on the date the federal court issued the injunction. These three circuits hold that if the injunction was not issued prior to the filing of the state court action, the AIA applies, regardless of when the federal lawsuit was filed. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 533 (6th Cir. 1978), *cert. dismissed,* 442 U.S. 925 (1979); *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58, 62 (2d Cir. 1990); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993).

In contrast, three other circuits have held that the determination as to whether the AIA applies to prohibit enjoining a subsequently filed state court action is based on the date the federal plaintiff applied for a temporary restraining order or filed a motion for an injunction. *Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937 (7th Cir. 1973); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982); *Hyde Park Partners, L.P. v. Connolly,* 839 F.2d 837, 842 n.6 (1st Cir. 1988) (dicta). Significantly, none of these cases can be read to support the proposition that the mere filing of a complaint in federal court is sufficient to make the AIA inapplicable to a subsequently filed state court action. For that reason, there is no conflict between the circuits as to whether, under the facts herein, Petitioners can overcome the AIA. Simply put, whether analyzing these facts under *Roth* or *Barancik,* the result is the same – the AIA prohibits the federal court from enjoining the California Labor Commissioner's state lawsuit.

The very first paragraph of *Barancik* announces that "[t]he question presented by this appeal is whether the [AIA] prohibits a federal court from staying proceedings in

a state court which were not commenced until after a motion to enjoin the institution of such proceedings was filed." *Barancik,* 489 F.2d at 934. Plaintiffs filed their motion for a preliminary injunction on July 27, 1972 – some three months after they had filed suit in federal court. While the motion for preliminary injunction was pending, seeking to bar defendants from commencing a separate legal action, defendants filed a separate action in state court. *Id.* at 934-935. The author of the *Barancik* decision, then-Judge Stevens, made clear the critical distinction between the filing of the federal lawsuit and the filing of the motion for injunctive relief: "The mere fact that the federal complaint was filed before the state proceeding was commenced is not sufficient to avoid the statutory bar. [citing *Kline v. Burke Construction Co.*, 260 U.S. 266 (1922), interpreting an earlier version of the AIA.] On the other hand, it is equally clear that since no state action was pending on July 27, 1972, when plaintiffs filed their motion, the statute would not have prevented the federal court from entering an injunction forthwith." *Barancik,* 489 F.2d at 936. The court ultimately concluded that the AIA's "applicability must be determined as of the time when the federal court's injunctive powers are invoked," which it defined as "the time the motion for an injunction is made." *Id.* at 937.

National City Lines is equally unhelpful to Petitioners, as it is apparent from the facts of that case that the federal plaintiff filed an application for a temporary restraining order contemporaneously with the filing of the federal lawsuit, on September 8, 1981. The very next day, a hearing was held before the district court judge, who deferred issuing a temporary restraining order after securing the parties' commitment to maintain the status

quo. Two days later, the defendant filed a state court action. *National City Lines, supra,* 687 F.2d at 1124. Based on these facts, the Eighth Circuit relied on *Barancik* to hold that the AIA did not bar the federal court from enjoining the state court action, as "the determinative date is September 8, 1981, the date on which National petitioned for injunctive relief in federal court." *Id.* at 1127-1128. Likewise, *Hyde Park Partners* also presents a case where the federal plaintiff filed a motion for a temporary restraining order at the same time it filed the federal lawsuit – 11:05 A.M. on December 21, 1987. The court scheduled a hearing on the motion for the next day, but at 4:45 P.M. on December 21, defendant filed a state court action. *Hyde Park Partners,* 839 F.2d at 840.

In short, there is not a single circuit court case that stands for the proposition that the mere filing of a federal lawsuit, without the filing of a motion for a temporary restraining order or preliminary injunction, is sufficient to overcome the AIA's prohibition against enjoining state court proceedings. Here, Petitioners' failure to invoke the district court's injunctive powers through the filing of a motion for a temporary restraining order or preliminary injunction is fatal to its claim for relief under both *Roth* and *Barancik.* The conflict between the circuits that have lined up behind these two cases notwithstanding, there is no conflict under the facts of this case. As this issue would be decided adversely to Petitioners by every circuit, this case does not present this Court with the opportunity to resolve those differences that do exist among the circuits.

II. UNDER THE CRITERIA ESTABLISHED BY THIS COURT, AS APPLIED BY VIRTUALLY EVERY CIRCUIT, THE AVAILABILITY OF A STATE FORUM TO RAISE AN ERISA PREEMPTION DEFENSE PRECLUDES APPLICATION OF THE "EXPRESSLY AUTHORIZED" EXCEPTION TO THE ANTI-INJUNCTION ACT

A. ERISA Is Not an "Expressly Authorized" Exception to the Anti-Injunction Act, As the Test Formulated in *Mitchum v. Foster* is Not Met Here, and Preemption is Insufficient to Create an "Expressly Authorized" Exception.

In *Mitchum v. Foster*, 407 U.S. 225, 237-238 (1972), this Court articulated the test used to determine whether a statute comes within the "expressly authorized" exception to the AIA. "In order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding," such that the Act in question "could be given its intended scope only by the stay of a state court proceeding." *Ibid.*, emphasis added. While it is axiomatic that ERISA created various federally protected rights, it simply was not enacted to create the type of uniquely federal right considered in *Mitchum*. There, this Court examined 42 U.S.C. §1983, whose "very purpose . . . was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* at 242. While ERISA may have been designed to unify the nation's law concerning employee welfare benefits, it was not enacted

out of some fear that "state courts were being used to harass and injure individuals." See *id.* at 240.

Petitioners must also overcome this Court's decision in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 881 (1977) (plurality opinion). In *Vendo,* this Court elaborated on the *Mitchum* test, explaining that, "[b]y limiting the statutory exceptions of §2283 and its predecessors to these few instances, we have clearly recognized that the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding." 433 U.S. at 640-641. Because the Clayton Act did not "by its very essence contemplate or envision any necessary interaction with state judicial proceedings," it was held not to be an exception to the AIA. *Ibid.* Petitioners have made no showing, and indeed none can be made, that ERISA meets the criterion established in *Vendo.*

The mere fact that a federal statute may preempt state law is insufficient to place that federal statute within the "expressly authorized" exception to the AIA. This Court has rejected such an argument time and again, and has stated, "[A] federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line,* 398 U.S. at 294 (citing *Amalgamated Clothing Workers,* 348 U.S. at 519-520). Instead, "when a state proceeding presents a federal issue, even a preemption issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo,* 486 U.S. at 149-150. Thus, despite this Court's finding that an employer's state court action against a union was "outside state authority" and that jurisdiction

was vested solely in the National Labor Relations Board, this exclusive federal jurisdiction was not sufficient to render the AIA inapplicable. *Vendo,* 433 U.S. at 637 n.8 (describing this Court's decision in *Amalgamated Clothing Workers*).

Petitioners urge that those circuits that have held that ERISA does not provide an "expressly authorized" exception to the AIA "undermine[] ERISA's purposes" and "impair ERISA's mandate for national uniformity." (Petition at 10-11.) However, "the importance of the federal policy to be 'protected' by the injunction is not the focus of the inquiry." *Vendo,* 433 U.S. at 636. "[T]he prohibitions of §2283 exist separate and apart from these traditional principles [of equity and comity]. And [this Court] cannot read the 'intended scope' language as rendering [§2283] . . . inoperative simply because important federal policies are fostered by the statute under which the injunction is sought." *Id.* at 639.

B. The Allegedly Conflicting Decisions Among the Circuit Courts Concerning Whether ERISA is an "Expressly Authorized" Exception to the Anti-Injunction Act are Distinguishable on Their Facts.

In contrast to the Third, Fourth and Fifth Circuits, two circuits – the Second and Sixth – have decided that ERISA operates as exception to the AIA. Compare *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980) [finding ERISA is an "expressly authorized" exception to AIA], and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985) [same], with *Total Plan Services, Inc. v. Texas Retailers Ass'n, Inc.*, 925 F.2d 142 (5th Cir. 1991) [finding no ERISA exception, and affirming district court's denial of

injunctive relief], *United States Steel Corp. Plan for Employees Insurance Benefits v. Musisko*, 885 F.2d 1170 (3d Cir. 1989), *cert. denied,* 493 U.S. 1074 (1990) [holding that ERISA's language and its legislative history fail to demonstrate a congressional desire to defeat the bar of §2283, and reversing district court's order granting injunctive and declaratory relief], *1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401 (3d Cir. 1992), *cert. denied,* 506 U.S. 1086 (1993) [same rationale as *Musisko*, affirming district court's denial of injunction, thereby allowing laid-off employees to maintain state court action, despite the circuit court's certainty that state court action is preempted by ERISA], and *Employers Resource Management Co. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995), *cert. denied,* 516 U.S. 1094 (1996) [holding that ERISA does not operate as an automatic exception to the AIA].

In its decision herein, the Fourth Circuit appears to have extended *Employers Resource Management* to all ERISA cases, adopting a categorical approach that ERISA can never operate as an exception to the AIA. (Appendix to Petition at 13a, n.9.) In her concurring opinion, Judge Williams observed that the result would be the same under the case-by-case approach that has been adopted by some of the other circuits, as there is nothing "in the text or legislative history of ERISA indicating that Congress intended to carve-out this type of case from the run-of-the mill ERISA case," so that under either test, "ERISA does not authorize the requested relief." *Ibid.* at 24a. Indeed, Petitioners assume too much when they argue that based on *Buha*, the Sixth Circuit would not have dismissed this

complaint under the AIA.[1] (Petition at 21.) In short, *Buha* is easily distinguishable, and "the 'circuit split' that allegedly exists . . . is far less troubling once the particular cases are examined." *Employers Resource Management,* 65 F.3d at 1132; see also *Musisko, supra,* 885 F.2d at 1178.

In *Buha*, the district court had enjoined a state court judge from enforcing a writ of attachment. The defendant, Buha, had previously obtained a state court judgment against Walter Kinsky in a tort action. Kinsky did not pay the judgment, and Buha instituted post-judgment garnishment procedures. A writ of garnishment was served on a bank that was serving as the trustee for a General Motors pension plan. The bank denied liability as a trustee of the pension fund, and Buha demanded an examination of the bank. General Motors filed an action in federal district court, requesting that the court restrain enforcement of the writ. *Buha*, 623 F.2d at 457. On appeal, the Sixth Circuit evaluated the propriety of the district court's decision to enjoin the state court proceedings. Its holding is nowhere near as sweeping as Petitioners now suggest. The Sixth Circuit held:

> When a district court finds that an action in a state court will have the effect of making it impossible for a fiduciary of a pension plan to carry out its responsibilities under ERISA, the anti-injunction provisions of §2283 do not

[1] Petitioners also assert that this issue would have been decided in its favor by the Second Circuit under *Gilbert*. But that Second Circuit decision can hardly be cited to support the notion that ERISA is an "expressly authorized" exception to the AIA. As other courts have observed, the *Gilbert* decision made this assertion in a conclusory manner, without any analysis. *Musisko*, 885 F.2d at 1178; *Employers Resource Management*, 65 F.3d at 1132-1133.

> prohibit it from enjoining the state court proceedings.

Id. at 459.

The dissimilarities between *Buha* and the instant case are striking. In *Buha*, the plaintiff was not even a party to the state court action, and thus, was unable to assert the defense of federal preemption in that proceeding. Here, Denny's, Inc. is a defendant in the lawsuit pending in the California state court, where it is able to assert (and, in fact, has already asserted) the defense of ERISA preemption in that proceeding. Appendix to Petition at 4a. In *Buha*, the federal court did find that the pending state court action could prevent the pension plan's trustee from carrying out its responsibilities under ERISA – namely, the responsibility to protect a beneficiary's pension funds from being used as a source of recovery in a tort action. Here, there has been no finding by the district or circuit courts (nor could there be any finding under the facts of this case) that the pending state action against Denny's, Inc. would make it impossible for an ERISA fiduciary to carry out its responsibilities under ERISA. There are a number of reasons why such a finding could not be made in this case.

First, the Labor Commissioner's state court action seeks recovery from Denny's – not from its purported ERISA plan or from any purported ERISA trust – for reimbursement of vacation wages unlawfully forfeited under California law. This is a far cry from *Buha*, where the enjoined state proceeding sought to garnish funds from an ERISA trust.

Second, as noted above, Denny's can assert (and has asserted) a preemption defense in the pending state action. Therefore, under *Mitchum*, Denny's cannot satisfy

the "expressly authorized" exception because it can obtain in the state court proceeding the exact remedy that it seeks from the federal court – i.e., a ruling that it provides vacation benefits to its employees through an ERISA plan, and that ERISA therefore preempts enforcement of California Labor Code §227.3. Again, this presents the opposite situation from *Buha*, where General Motors was not a party to the state court proceedings and therefore could not assert an ERISA preemption defense.

Finally, despite numerous and repeated assertions from Denny's that it maintains an ERISA plan to provide vacation benefits to its eligible employees, there has been no court finding that Denny's vacation pay program in fact constitutes an ERISA plan. Such a finding is required under *Buha*, as a necessary predicate to a court finding that the pending state action would make it impossible for the ERISA fiduciaries to carry out their responsibilities under ERISA. Not only has there not been any such court finding here, but the United States Department of Labor ("DOL") – the administrative agency charged with enforcing ERISA – has now made the exact opposite finding. In a DOL advisory opinion issued on July 2, 2004 at the request of Denny's, DOL concluded, relying on this Court's opinion in *Massachusetts v. Morash*, 490 U.S. 107 (1989), that Denny's Vacation Plan and Trust is not an employee welfare benefit plan within the meaning of ERISA but rather, is "a mere pass-through vehicle for the employer's payment of ordinary vacation wages." Appendix at 32.

This federal agency's application of the law to the facts (that were presented to it by Denny's, presumably in the light most favorable to Denny's), reflects "a body of experience and informed judgement to which courts and litigants may properly resort for guidance." *Yates v.*

Hendon, ___ U.S. ___, 124 S.Ct. 1330, 1339 (2004), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As such, the DOL's finding all but ends Denny's argument that the state court action should be enjoined under the "expressly authorized" exception to the AIA, as it presents a virtually insurmountable barrier to a court finding – required under *Buha* – that the pending state action will make it impossible for the ostensible ERISA fiduciaries to carry out their ostensible responsibilities under ERISA. And no matter how emphatically Petitioners have asserted that they will be unable to carry out their responsibilities under ERISA if the Labor Commissioner's state lawsuit goes forward, or if Denny's is subjected to California vacation law, these emphatic assertions are not a substitute for a court finding.

Thus, notwithstanding the differences in analysis between those circuits that take a categorical view that ERISA never comes within the "expressly authorized" exception to the AIA, and those circuits that take a case-by-case approach under which certain ERISA cases will come under the exception while others will not, the facts of this case compel the same result – inapplicability of the "expressly authorized" exception. Under closer analysis of the purported conflict, it becomes apparent that every circuit that has analyzed the question would conclude that Petitioners cannot meet the standard articulated in *Mitchum*, and as such, cannot overcome the AIA. This case therefore does not present an opportunity for this Court to clarify the standard to be followed under the "expressly authorized" exception.

III. DECLARATORY RELIEF IS ALSO BARRED BY THE ANTI-INJUNCTION ACT; OTHERWISE THE AIA WOULD SERVE NO FUNCTION AT ALL

In *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d at 884, the Fifth Circuit quoted its earlier en banc decision in *Texas Employers Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1987) for the holding that a declaratory judgment issued by a district court is invalid where the AIA bars injunctive relief, because "[t]o allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand." *Id.* at 505. Here, the Fourth Circuit reached the same conclusion, stating "if the [AIA] bars the injunctions Denny's has sought, it also bars the declaratory relief it has sought." Appendix to Petition at 12a, n.8.

This was the precise rationale of this Court when it decided *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion case to *Younger v. Harris*, 401 U.S. 37 (1971). Relying on its prior decision in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) [a case arising under the Tax Injunction Act], this Court held that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Samuels v. Mackell*, 401 U.S. at 73.

Petitioners assert that two federal circuit decisions have taken a more relaxed view of the propriety of

declaratory relief under circumstances where the AIA prohibits injunctive relief. Significantly, both of these decisions acknowledge that as a general rule, declaratory relief should not be available when the district court is prohibited from enjoining the state proceedings under the AIA. *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328, 1332 (3d Cir. 1971); *Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.* 996 F.2d 774, 776 (5th Cir. 1993). However, these two cases stand for the proposition that there are "a very small class of highly distinguishable cases which are exceptions to the broad rule." *Id.* at 776. Petitioners' reliance on these two cases is misplaced, however, in that there is nothing about this case that would put it into this "very small class of highly distinguishable cases."

Thiokol would remove from the general rule certain state lawsuits which "are likely to turn on a question of federal law with which a federal court is likely to be more familiar and experienced than the state court." 448 F.2d at 1332. Whether or not the Labor Commissioner's state court action against Denny's is likely to turn on the defense of federal preemption, it cannot be said that federal courts are any more or less likely than state courts to be familiar and experienced with preemption issues – which by definition, only arise at the intersection of federal and state law. It is of course well established that there is no grant of exclusive jurisdiction to federal courts to resolve ERISA preemption questions when they are asserted defensively. See, e.g., *Fresh Int'l v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1362 n.13 (9th Cir. 1986) ["We do not read section [1132] as foreclosing a state court from considering a defense based on ERISA preemption"]; see also *Catepillar, Inc. v. Williams*, 482 U.S. 386, 400

(1987) [federal defense in state court action will not deprive state courts of jurisdiction].

Travelers Insurance would remove from the general rule certain federal declaratory relief actions that are not brought to nullify the other party's advantage in state court, or to change forums, but rather, that are brought to avoid a multiplicity of suits in various forums. 996 F.2d at 776-777. Under the facts here, Petitioners' federal action does not come within any of the *Travelers Insurance* factors. Less than two months after the California Labor Commissioner proposed a "global resolution" of vacation claims or, absent such resolution, the "fil[ing] of an action against Denny's to finally resolve this issue," Denny's filed this lawsuit in a federal court 3,000 miles away from California. Appendix to Petition at 3a. It would be hard to imagine a more spectacular example of procedural gamesmanship, with the obvious purpose of disadvantaging the Labor Commissioner. Ironically, one of the allegations contained in Petitioners' complaint is that the Commissioner's enforcement of California vacation law against Denny's is precluded by a prior order of the district court for the Central District in California in *California Hospital Ass'n v. Henning,* 569 F.Supp. 1544 (C.D. Cal. 1983). Appendix at 10.

Thus, if this matter belongs in federal court at all, the Central District of California certainly would seem like the logical venue. But this action was filed not just to change forums (from state court to federal court) but primarily, to make it impractical for the Labor Commissioner to litigate at all by changing the forum venue from California to South Carolina. Whatever the merits of carving out any exceptions from the general rule that denies declaratory relief if the AIA precludes injunctive relief, one thing is

clear – the *Travelers Insurance* court would show no sympathy for Petitioners' claim: "Using a declaratory judgment to race to *res judicata* or to change forums is thoroughly inconsistent with the purposes of the Declaratory Judgment Act and should not be countenanced." *Travelers Insurance*, 996 F.2d at 777 n.7.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

DENNY'S, INC., in its fiduciary capacity as plan administrator; DENNY'S INC. VACATION PAY PLAN; ANDREW F. GREEN, in his capacity as trustee of the DENNY'S, INC. EMPLOYEE BENEFITS TRUST; and DENNY'S, INC. EMPLOYEE BENEFITS TRUST,	**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
Plaintiffs,	**(Filed Sep. 6, 2002)**
v.	**Case No.: 7-02-2968-20**
CHUCK CAKE, in his capacity as Acting Director of the California Department of Industrial Relations and ARTHUR LUJAN, in his capacity as the Labor Commissioner of the State of California,	
Defendants.	

Plaintiffs, complaining of Defendants, state as follows:

1. This action seeks a declaration, pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, *et seq.*, that the Denny's, Inc. Vacation Pay Plan (the "Plan") and the Denny's, Inc. Employee Benefits Trust (the "Trust"), established by Denny's, Inc.

("Denny's"), and administered and managed by Denny's and Andrew F. Green, in his capacity as a trustee of the Trust (the "Trustee", constitute an employee welfare benefit plan subject to Title I, Subtitles A and B of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq.*

2. Denny's does business and employs approximately 30,000 employees in 36 states, including California. Denny's maintains its principal place of business in Spartanburg, South Carolina. Denny's maintains the Plan and the Trust for the purpose of providing vacation benefits to its eligible employees. The Plan is an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1). The Trust is a South Carolina Trust and is maintained pursuant to and as part of the Plan.

3. Denny's is the administrator of the Plan within the meaning of 29 U.S.C. § 1002(16)(A) and is a fiduciary of the Plan within the meaning of 29 U.S.C. § 1002(21). The Plan is administered by Denny's in South Carolina. The Trustee is a fiduciary of the Plan within the meaning of 29 U.S.C. § 1002(21). The Trust is administered and managed by the Trustee in South Carolina. The Plan and the Trust constitute an employee welfare benefit plan pursuant to 29 U.S.C. § 1002(1). The Trustee is a citizen and resident of South Carolina.

4. The California Department of Industrial Relations is a governmental agency created by the State of California in order to promote, protect, and improve the health, safety and economic well-being and improve the working conditions of employees working within the State of California and is based in Sacramento, California. The

California Department of Industrial Relations is responsible for promulgating state regulations related to California labor and employment law statutes and enforcing the labor and workplace safety and health laws of the State of California. Defendant Chuck Cake is the Acting Director of the California Department of Industrial Relations and directs the activities, agents, and employees of the California Department of Industrial Relations.

5. The California Division of Labor Standards Enforcement (the "DLSE") is a government agency of the State of California that falls within the jurisdiction of the California Department of Industrial Relations. The DLSE is responsible for, among other things: (1) adjudication of wage claims brought under the California Labor Code and other provisions of the laws of the State of California including, but not limited to, the regulations and wage orders promulgated by the California Department of Industrial Relations through its Industrial Welfare Commission, and (2) investigating and prosecuting complaints brought against California employers for potential violations of the California Labor Code and other provisions of the laws of the State of California including, but not limited [sic], the regulations and wage orders promulgated by the California Department of Industrial Relations through its industrial Welfare Commission. Defendant Arthur Lujan is the California Labor Commissioner and is the director and individual in charge of the DLSE. Defendant Arthur Lujan directs the activities of the DLSE. In addition, the DLSE staff, as well as its enforcement personnel are agents of Defendants Lujan and Cake and are subject to their control and direction.

6. This case arises under the Constitution and the laws of the United States of America. This case presents a

federal question within this Court's jurisdiction under Article III of the Constitution of the United States of America and 29 U.S.C. § 1331 and 29 U.S.C. § 1001, *et seq.*

7. This Court has authority to grant declaratory and injunctive relief as requested in this Complaint pursuant to 28 U.S.C. § 2201, *et seq.*, Rule 57 of the Federal Rules of Civil Procedure, and 29 U.S.C. § 1132(a)(3).

8. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) and pursuant to 29 U.S.C. § 1132(e)(2).

9. The Plan provides vacation benefits under specified uniform terms to eligible employees of Denny's throughout the United States, including California employees. The Plan is funded through the Trust. The Trust is a separate trust and the assets of the Trust are separate from the assets of Denny's. The Trust is funded through regular and periodic contributions by Denny's. The Trustee is authorized to receive, hold, invest, and distribute the funds in the Trust pursuant to the terms of the Trust. Vacation benefits under the Plan are paid directly to eligible employees from the Trust pursuant to the terms of the Plan. The assets of the Trust are to be used solely for the purposes of paying vacation benefits under the Plan and paying the reasonable administrative expenses of the Plan and the Trust.

10. The Plan provides for the payment of vacation benefits under the terms set forth in the applicable summary plan descriptions of the Plan, which are incorporated into and made part of the Plan. The summary plan descriptions of the Plan are distributed to the eligible employees of Denny's. The summary plan descriptions of the Plan state that employees are entitled to certain rights and protections under ERISA. The Plan provides that the

terms of the Trust are incorporated into and made part of the Plan. The terms of the Trust provide that the Plan is an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1) and that the Trust is intended to meet the requirements of ERISA. The Plan and the Trust have been operated in a manner consistent with Denny's intent that the Plan and the Trust are subject to ERISA.

11. One of the fundamental objectives of ERISA is to preclude state regulation of employee benefit plans so that multistate employers, such as Denny's, can provide uniform employee benefits throughout the United States. ERISA generally preempts "any and all State laws insofar as they may . . . relate to any employee benefit plan . . . ". 29 U.S.C. § 1144(a) The term "employee benefit plan" is defined under ERISA to include an "employee welfare benefit plan", which, in turn, is defined as "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . vacation benefits. . . . " 29 U.S.C. § 1002(1). The application of California (or other state law) to the Plan and the Trust could require that Denny's provide benefits under different terms in the various states in which it operates. In addition, the application of California law to the Plan and the Trust would require that Denny's and the Trustee operate the Plan and the Trust in a manner that is inconsistent with the terms of the Plan and the Trust and in violation of their fiduciary duties under ERISA.

12. In determining whether a vacation benefit plan and trust constitute an employee welfare benefit plan under ERISA, the United State [sic] Supreme Court has concluded that "[t]he creation of a separate fund to pay employees' vacation benefits would subject a single

employer to the regulatory provisions of ERISA." *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989).

13. Over the last five years, a number of Denny's former California employees have filed claims with DLSE, seeking unpaid vacation wages and waiting time penalties pursuant to the California Labor Code and other provisions of California law. In many of these cases, Denny's has presented the DLSE with copies of the Plan and the Trust documents and the DLSE has subsequently dismissed the former employees' claims on the ground that the Plan and the Trust constitute an employee welfare benefit plan under ERISA and there is no claim under California law because of preemption of California law by ERISA. However, recently, the DLSE has taken a contradictory position and concluded that the Plan and the Trust do not constitute an employee welfare benefit plan under ERISA and that California law is applicable. The DLSE now takes the position that California law was violated by the actions of Denny's, as the Plan administrator, and by the payment of benefits in accordance with the terms of the Plan and the Trust, and that the former Denny's employees are entitled to monetary damages and penalties under California law.

14. On July 11, 2002, Denny's received a letter from Susan A. Dovi, Esquire, a staff attorney working on behalf of and at the direction of both Defendants, in which Ms. Dovi concluded that the Plan and the Trust do not constitute an employee welfare benefit plan under ERISA and that the operation of the Plan and the Trust violates § 227.3 of the California Labor Code and other provisions of California law. In her letter, Ms. Dovi indicated that the DLSE intends, at some unspecified date, to file a lawsuit seeking unpaid vacation benefits and penalties for all

former California employees of Denny's for a four-year period of time.

15. The Plan provides that a salaried employee cannot use vacation benefit days until he or she has completed six months of continuous service with Denny's. The Plan further provides that a salaried employee will not be paid any vacation benefits upon termination of his or her employment unless he or she has completed six months of continuous service. The Plan provides similar rules in the case of hourly employees during the first year of continuous service. The DLSE takes the position that, under California law, a Denny's California employee's accumulated vacation benefit days constitute deferred wages that vest and that such an employee's accumulated vacation benefit days cannot be forfeited as a result of termination of employment. The DLSE now asserts that the operation of the Plan and the Trust with respect to Denny's California employees violates California law because of the forfeiture of unused accumulated vacation benefit days and as referenced in Paragraph 14 above, has threatened to file an action against Denny's and the Trust for damages for alleged violations of California law. No such action has yet been filed.

16. The provisions of California law that Defendants seek to enforce conflict with the terms of the Plan and the Trust, and the enforcement of these provisions would require that Denny's and the Trustee violate their fiduciary duties under 29 U.S.C. § 1104(a)(1)(D) to operate and manage the Plan and the Trust in accordance with the terms of the Plan and the Trust. The California laws that Defendants seek to enforce are state laws that relate to the Plan and the Trust and are thus preempted pursuant to 29 U.S.C. § 1144(a). The Defendants' threatened enforcement

of said California laws and the Defendants' legal position as set forth in the aforementioned July 11, 2002 letter of Susan A. Dovi, Esquire would thus violate federal law and would be contrary to said preemption of state laws by ERISA.

17. The United States District Court, Central District of California previously issued a judgment against Patrick W. Henning, Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, in which the District Court held that the California laws that Defendants presently seek to enforce against Plaintiffs were preempted by ERISA insofar as such laws related to funded vacation plans and programs.

18. In this prior litigation, the District Court granted summary judgment, holding that the vacation plans and programs of employers engaged in interstate commerce constitute employee welfare benefit plans subject to ERISA and that California law was preempted insofar as such law purported to regulate such plans or programs. See *California Hospital Association v. Henning*, 569 F.Supp. 1544 (C.D. Cal. 1983). The District Court then issued a permanent injunction barring Defendants' predecessor Labor Commissioner Henning from taking action to enforce California law against unfunded and funded vacation plans and programs.

19. On appeal, the Ninth Circuit Court of Appeals reversed the District Court with respect to unfunded vacation plans and programs and remanded the case to the District Court for a determination of whether the application of ERISA to funded vacation plans and programs was an issue litigated below on which the plaintiffs

prevailed and, If so, whether attorneys' fees should be awarded.

20. On remand, the District Court in *Henning* concluded that the issue of the application of ERISA to funded vacation plans and programs was litigated and decided by the District Court in its original opinion and that plaintiffs had, in fact, prevailed on that issue. The District Court then modified its prior judgment, in part, as follows:

> (a) The plaintiffs' motion for summary judgment was granted, in part on the ground that funded vacation plans and programs maintained by employers engaged in interstate commerce are employee welfare benefit plans subject to ERISA and ERISA preempted California law as to funded vacation plans;
>
> (b) That DLSE lacked jurisdiction over vacation plans and programs which qualify as employee welfare benefit plans within the meaning of ERISA; and
>
> (c) The District Court dissolved the permanent injunction previously issued by the court "based on the representations by [Labor Commissioner Henning's] counsel that [Labor Commissioner Henning] does not intend to enforce state laws against, or assert jurisdiction over, funded vacation programs. . . . "

21. Contrary to Defendants' predecessor's prior representations to the District Court in *Henning* and in disregard of the order issued by the *Henning* court, Defendants now seek to enforce California state law against, and assert jurisdiction over the Plan and the Trust, which constitute a funded vacation plan.

22. Due to Defendants' threatened enforcement action against Plaintiffs as outlined above, and because said threatened actions are contrary to Defendants' predecessor's prior representations to the District Court in *Henning* and are in disregard of the order of the District Court in *Henning*, preliminary and permanent injunctions should be issued barring Defendants from taking any such threatened enforcement actions.

23. A declaration by this Court setting forth whether the Plan and the Trust constitute an employee welfare benefit plan under ERISA and whether Defendants are precluded by prior order of the District Court in *Henning* from attempting to enforce California law with regard to the Plan and the Trust: (1) is necessary to resolve the controversy between the parties, (2) would serve a useful purpose in clarifying the legal issues in dispute and allow the Plaintiffs to thus determine whether the Plan and the Trust are subject to California law, and (3) would serve the interest of judicial economy.

WHEREFORE, Plaintiffs pray for the following relief:

1. A declaration pursuant to Rule 57 of the Federal Rules of Civil Procedure, 28 U.S.C. § 2201, *et seq.*, and 29 U.S.C. § 1132(a)(3) that:

> (a) The Plan and the Trust constitute an employee welfare benefit plan under 29 U.S.C. § 1002(1) and are subject to Title I, Subtitles A and B of ERISA;
>
> (b) ERISA preempts the California statutes, regulations, and any action or decision of Defendants having the effect of law that Defendants seek to enforce against any of the Plaintiffs based upon California law; and

(c) Defendants are precluded by prior order of the United States District Court in *Henning* from attempting to enforce California law with regard to the Plan and the Trust and from contending that ERISA does not preempt any such action on Defendants' part;

2. Preliminary and permanent injunctions barring Defendants from taking any action to enforce California law against Plaintiffs with regard to the Plan and the Trust;

3. Plaintiffs' attorneys' fees and costs in this matter; and

4. Such other and further relief as this Court deems just and proper.

HOLCOMBE, BOMAR, GUNN
AND BRADFORD, P.A.

By: [Signature]
Perry D. Boulier, I.D. #1008
Post Office Drawer 1897
Spartanburg, SC 29304
(864) 585-4273

Attorneys for Plaintiffs

September 6, 2002
Spartanburg, SC

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
BY: ANNE HIPSHMAN, SBN 095023
MILES E. LOCKER, SBN 103510
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Attorneys for the Labor Commissioner, Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, NORTHERN DIVISION
(UNLIMITED JURISDICTION)

ARTHUR S. LUJAN, STATE LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA, Plaintiff, vs. ADVANTICA RESTAURANT GROUP, INC., a Delaware corporation; DENNY'S CORPORATION, a Delaware corporation formerly known as ADVANTICA RESTAURANT GROUP; DENNY'S, INC., a California corporation; EL POLLO LOCO, INC., a California corporation; and DOES 1-10, inclusive, Defendants.	Case No.: 2002065951 COMPLAINT FOR UNPAID WAGES; PENALTIES; INJUNCTIVE RELIEF [No fee per Labor Code section 101, et seq.] (Filed Sep. 24, 2002)

Plaintiff, DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, State of California, by and through ARTHUR S. LUJAN, the State Labor Commissioner, complains of Defendants, and each of them, and alleges as follows:

FIRST CAUSE OF ACTION

(Unpaid Wages – Against All Defendants)

1. Plaintiff, ARTHUR S. LUJAN, the Labor Commissioner of State of California and the Chief of the DIVISION OF THE LABOR STANDARDS ENFORCEMENT (hereinafter the "DIVISION" or the "LABOR COMMISSIONER"), a division of the Department of Industrial Relations, State of California, is authorized to bring this action pursuant to Labor Code sections 95(a), 96.7, 98.3, 217, 1194.5, and 1195.5

2. At all times herein mentioned, Defendants, ADVANTICA RESTAURANT GROUP, INC., a Delaware corporation, DENNY'S CORPORATION, a Delaware corporation formerly known as ADVANTICA RESTAURANT GROUP, INC., were and are corporations doing business in the County of Alameda in the State of California, and have owned and operated various restaurants throughout California, including the County of Alameda.

3. At all times herein mentioned, Defendant DENNY'S, INC., a California corporation, has been a wholly owned subsidiary of defendants ADVANTICA RESTAURANYT [sic] GROUP, INC., and DENNY'S CORPORATION, and has operated restaurants known as "Denny's" throughout California, including the County of Alameda. These defendants entered into contracts with

employees to perform work in Alameda County, which provided for vacation benefits as described in paragraph 8, hereinbelow, and for forfeiture of vacation time in violation of California law as described in paragraph 9, hereinbelow.

4. At all times herein mentioned, defendant EL POLLO LOCO, INC., a California corporation, has been a wholly owned subsidiary of defendants ADVANTICA RESTAUARANT [sic] GROUP, INC., and DENNY'S CORPORATION, and has operated restaurants throughout California known as "El Pollo Loco".

5. Plaintiff is ignorant of the true names and capacities of DOES 1 Through 10, inclusive, and for that reason sues said defendants by such fictitious names. Leave of court will be requested to amend this complaint to show their true names and capacities when they have been ascertained.

6. California Labor Code sections 201, 202, 227.3, 2926, and 2927, require the full and complete payment of all wages earned but not yet paid, including all accrued vacation wages, either immediately (in the event of discharge) or within 72 hours (in the event of a quit) upon termination of the employment relationship. Labor Code §227.3 expressly prohibits the forfeiture of vested vacation time upon termination, and requires the payment of such vested vacation time as wages at the employee's final rate of pay. The California Supreme Court, in *Saustez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, held that vacation vests as it is earned, and that it constitutes a form of deferred wages which cannot be forfeited upon termination.

7. At all times relevant herein, Defendants, and each of them, have owned and/or operated restaurants, have employed workers in the furtherance of their restaurant businesses, and have been subject to the above-referenced provisions of the California Labor Code.

8. At all times relevant herein, Defendants, and each of them, have employed workers pursuant to a written vacation pay policy which provides that: (a) eligible employees begin earning vacation upon hire, (b) during the first six months of employment for salaried management employees or during the first year of employment for hourly paid employees, the employee may not use any of his or her earned vacation hours, and (c) if the salaried management employee terminates or is terminated prior to having completed six months of employment, or if the hourly paid employee terminates or is terminated prior to having completed one year of employment, then no payout for unused vacation hours will occur, and the earned vacation time will be forfeited. A copy of Defendants' vacation pay plan is attached hereto as Exhibit "A".

9. The above-described written vacation pay policy is unlawful in that it violates Labor Code sections 201, 202, 227.3, 2926, and 2927. At all times relevant herein, Defendants, and each of them, pursuant to their unlawful vacation pay policy, have forfeited vested vacation wages of salaried management employees who separated from employment prior to completing six months of service with defendants, and have forfeited vested vacation wages of hourly paid employees who separated from employment prior to completing one year of service with defendants.

10. Defendants and the Division have entered into a tolling agreement effective July 15, 2002, tolling the

statute of limitations on any action that might be filed by the Labor Commissioner with regard to defendants' written vacation pay policy.

11. At all times relevant herein, Defendants, and each of them, have failed and refused, and continue to fail and refuse, to pay any of the wages owed to its employees whose vested vacation wages were unlawfully forfeited pursuant to defendants' vacation pay policy.

12. As a result of defendants' violation of the above-cited provisions of the California Labor Code, workers employed by defendants have been injured through the unlawful forfeiture of vested vacation wages. Defendants' employees who separated from employment on or after July 15, 1998 are entitled to payment of these unlawfully forfeited vested vacation wages, with the exact amount of such unpaid wages (in excess of the jurisdictional limit of limited jurisdiction courts) to be ascertained at or before trial.

SECOND CAUSE OF ACTION

(Penalties, Labor Code §203 – Against All Defendants)

As a separate and distinct cause of action, Plaintiff complains of Defendants and each of them, and alleges as follows:

13. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1 Through 12, inclusive, of the First Cause of Action as though fully set forth herein.

14. Defendants' failure or refusal to pay their terminated employees their vested vacation at their final rates

of pay within the time required by Labor Code sections 201 or 202 was "willful" within the meaning of Labor Code section 203, in that defendants had a legal obligation to pay such wages promptly upon termination of employment and intentionally failed to do so.

15. As a result of defendants' willful failure to pay the vested vacation wages to employees who separated from employment on or after July 15, 1998, each such employee is entitled to payment of waiting time penalties pursuant to Labor Code §203, in an amount equal to thirty days of each employee's daily wages, with the exact amount (in excess of the jurisdictional limit for limited jurisdiction courts) to be ascertained at or before trial.

THIRD CAUSE OF ACTION

(Injunctive Relief – Against All Defendants)

As a separate and distinct cause of action, Plaintiff complains of defendants and each of them and alleges as follows:

16. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1 through 12, inclusive, of the First Cause of Action and Paragraphs 13 through 15, inclusive, of the Second Cause of Action, as though fully set forth herein.

17. By doing the acts complained of hereinabove, Defendants, and each of them, have willfully violated the provisions of California Labor Code sections 201, 202, and 227.3. Defendants have failed and refused, and continue to fail and refuse, to comply with said provisions, and unless directed by this Court to cease and desist from violating said provisions, and to comply with said provisions,

Defendants will continue to violate and fail to comply with said provisions.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

AS AND FOR THE FIRST CAUSE OF ACTION:

1. For unpaid vacation wages according to proof;
2. For pre-judgment interest on all unpaid vacation wages, pursuant to Labor Code section 218.6;
3. For costs;
4. For any other relief the Court deems just and proper.

AS AND FOR THE SECOND CAUSE OF ACTION:

1. For waiting time penalties pursuant to Labor Code section 203 according to proof;
2. For costs;
3. For any other relief the Court deems just and proper.

AS AND FOR THE THIRD CAUSE OF ACTION:

1. For an order and judgment directing and requiring Defendants, their agents, officers, and assigns, to cease and desist from violating Labor Code sections 201, 202 and 227.3, and to comply with all provisions of the California Labor Code regarding the payment of vested vacation wages to employees promptly upon termination of employment;
2. For costs;
3. For any other relief the Court deems just and proper.

Dated: 9/22/02

DIVISION OF LABOR
STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

By: /s/ [Signature]
SUSAN A. DOVI
Attorney for the Labor
Commissioner

(N.B. When the State is plaintiff, complaint need not be verified, but that the answer thereto must be verified. C.C.P. section 446.)

U.S. District Court
Web PACER (v2.4)
Docket Report

[Docket as of April 14, 2003, 8:30 p.m.]

U.S. District Court

District of South Carolina (Spartanburg)

CIVIL DOCKET FOR CASE #: 02-CV-2968

Denny's Inc, et al v. Cake, et al

Filed: 09/06/02
Assigned to: Judge Henry M. Herlong, Jr
Demand: $0,000
Nature of Suit: 791
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

DENNY'S INC, in its fiduciary capacity as plan administrator plaintiff	Perry D Boulier 864-585-3844 [COR LD NTC] Holcombe Bomar Gunn and Bradford PO Box 1897 Spartanburg, SC 29304 864-585-4273
DENNY'S INC VACATION PAY PLAN plaintiff	Perry D Boulier (See above) [COR LD NTC]
ANDREW F GREEN, in his capacity as trustee of the Denny's Inc Employee Benefits Trust plaintiff	Perry D Boulier (See above) [COR LD NTC]

DENNY'S INC EMPLOYEE BENEFITS TRUST plaintiff	Perry D Boulier (See above) [COR LD NTC]
v.	
CHUCK CAKE, in his capacity as Acting Director of the California Department of Industrial Relations defendant	Wendy Bergfeldt Cartledge 803-896-4471 [COR LD NTC] Geoffrey Ross Bonham 803-896-4471 [COR LD NTC] South Carolina Department of Labor Licensing and Regulation PO Box 11329 Columbia, SC 29211-1329 803-896-4470 Anne Hipshman Miles E Locker Susan A Dovi Department of Industrial Relations State of California Division of Labor Standards Enforcement 455 Golden Gate Avenue 9th Floor San Francisco, CA 94102 415-703-4863
ARTHUR LUJAN, in his capacity as the Labor Commissioner of the State of California defendant	Wendy Bergfeldt Cartledge (See above) [COR LD NTC] Geoffrey Ross Bonham (See above) [COR LD NTC]

Anne Hipshman
(See above)
Miles E Locker
(See above)
Susan A Dovi
(See above)

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
9/6/02	1	COMPLAINT for Declaratory and Injunctive Relief; FILING FEE $ 150.00 RECEIPT # 600 13990 Scheduling order due by 12/16/02 Service due by 1/4/03 for Arthur Lujan, for Chuck Cake (awil) [Entry date 09/09/02]
9/6/02	2	SUMMONS(ES) issued for defendant Chuck Cake, defendant Arthur Lujan (awil) [Entry date 09/09/02]
9/6/02	3	ANSWER to Local Rule 26 Interrogatories by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee (awil) [Entry date 09/09/02]
9/25/02	4	AFFIDAVIT OF SERVICE of summons and complaint executed as to defendant Chuck Cake 9/16/02 Assignment Interrogatories due on 10/16/02 for Chuck Cake; Answer due on 10/7/02 for Chuck Cake executed by personal service (awil)
9/25/02	5	AFFIDAVIT OF SERVICE of summons and complaint executed as to defendant Arthur Lujan 9/16/02 Assignment Interrogatories

		due on 10/16/02 for Arthur Lujan; Answer due on 10/7/02 for Arthur Lujan executed by personal service (awil)
9/26/02	6	MOTION by defendant Chuck Cake, defendant Arthur Lujan for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
9/26/02	7	AFFIDAVIT of Susan A. Dovi by defendant Chuck Cake, defendant Arthur Lujan Re: [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
9/26/02	8	AFFIDAVIT of Miles E. Locker by defendant Chuck Cake, defendant Arthur Lujan Re: [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
9/26/02	9	AFFIDAVIT of Anne Hipshman by defendant Chuck Cake, defendant Arthur Lujan Re: [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (lcos) [Entry date 09/27/02]
10/4/02	10	MOTION by defendant Chuck Cake to dismiss (jout) [Entry date 10/07/02]
10/4/02	11	MEMORANDUM by defendant Chuck Cake in support of [10-1] motion to dismiss with appendix of out of region authorities attached (jout) [Entry date 10/07/02]
10/4/02	12	NOTICE of request for judicial notice filed in support of their motion to dismiss by

		defendant Chuck Cake (jout) [Entry date 10/07/02]
10/9/02	13	MOTION by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee to extend time (awil) [Entry date 10/10/02]
10/9/02	14	AFFIDAVIT of Perry D. Boulier by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee Re: [13-1] motion to extend time (awil) [Entry date 10/10/02]
10/11/02	15	ORDER granting [13-1] motion to extend time (signed by Judge Henry M. Herlong Jr; EOD October 11, 2002, SVD (awil)
10/18/02	16	ORDER granting [6-1] motion for Anne Hipshman, Miles Locker, and Susan Dovi to appear pro hac vice FILING FEE AMOUNT $225.00 Receipt # 3006134 (signed by Judge Henry M. Herlong Jr; EOD October 21, 2002, SVD (awil) [Entry date 10/21/02]
11/4/02	17	RESPONSE IN OPPOSITION by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee to [10-1] motion to dismiss (awil) [Entry date 11/05/02]
11/12/02	18	REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS by defendant Chuck Cake, defendant Arthur Lujan to [17-1] motion response (ljon) [Entry date 11/13/02]
11/12/02	19	SUPPLEMENTAL REQUEST/MOTION by defendant Chuck Cake, defendant Arthur Lujan for judicial notice filed in support of their motion to dismiss (ljon) [Entry date 11/13/02]

1/16/03	20	LETTER of Wendy B. Cartledge Re: (ajac) [Entry date 01/17/03]
2/27/03	21	ORDER granting [10-1] defendants' motion to dismiss for lack of personal jurisdiction (signed by Judge Henry M. Herlong Jr; eod February 27, 2003, svd (awil)
2/27/03	–	Case closed (awil)
3/18/03	22	NOTICE OF APPEAL by plaintiff Denny's Inc, plaintiff Denny's Inc Vacation, plaintiff Andrew F Green, plaintiff Denny's Inc Employee Re: [21-1] order Fee Status: paid Receipt # 600 14980 (jsmi)
3/18/03	–	Notice of appeal and certified copy of docket to USCA: [22-1] appeal by Denny's Inc Employee, Andrew F Green, Denny's Inc Vacation, Denny's Inc (jsmi)
3/27/03	–	NOTICE of Docketing ROA from USCA Re: [22-1] appeal by Denny's Inc Employee, Andrew F Green, Denny's Inc Vacation, Denny's Inc USCA NUMBER: 03-1326 CASE MGR: Joy Hargett (jsmi)
3/27/03	23	Certificate that the Record on Appeal is Complete for [22-1] appeal by Denny's Inc Employee, Andrew F Green, Denny's Inc Vacation, Denny's Inc (jsmi)

[LOGO] **U.S. Department of Labor**
Employee Benefits
Security Administration
www.dol.gov/ebsa

Advisory Opinion

July 2, 2004

2004-08A
ERISA Sec. 3(1)

Mr. Barry V. Frederick
Wiggins Childs Quinn & Pantazis
301 19th Street North
Birmingham, AL 35203

Dear Mr. Frederick:

This is in response to your request on behalf of Denny's, Inc. for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you asked whether the Denny's, Inc. Vacation Pay Plan (Plan) is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA.

You provided the following facts and representations in support of your request. The Plan was established to provide paid vacation benefits to eligible employees of Denny's, Inc. and certain affiliates (Denny's). Eligible full and part-time employees earn vacation hours under the Plan based on average hours worked, length of service, and level of employment. The maximum accrual is 6.67 hours per month for hourly employees and 13.3 hours per month for salaried employees. Hourly employees may carry up to 80 vacation hours over from year-to-year and salaried employees can carry up to 1 year of vacation time. Participants must submit a request to the Plan prior to

taking vacation in order to receive vacation pay from the Plan. Upon termination, whether voluntary or involuntary, salaried employees with six or more months of continuous service and hourly employees with 1 year of continuous service are paid their accumulated but unused vacation pay balance. You indicated that few employees carry vacation pay balances because of Denny's rate of employee turnover.

Denny's established the Denny's Inc. Employee Benefit Trust (Trust) to fund the Plan. The Trust is intended to be a tax-exempt voluntary employees' beneficiary association (VEBA) under section 501(c)(9) of the Internal Revenue Code. The Trust document provides that, "[t]he Trust shall be held and maintained for the exclusive benefit of the [e]mployees," and that, "[n]o part of the net earnings of the Trust shall inure (other than as Benefit payments) to the benefit of the [e]mployer or any individual." Denny's retains the right to amend or terminate the Plan at any time, but no amendment or termination can permit reversion of any part of the Trust to Denny's. The Trust document states that, "[t]he net income and profits of the Trust Fund shall be accumulated, added to the principal of the Trust Fund, and invested and reinvested therewith as a single fund by the Trustee." You represent, however, that the Trust assets are held in a non-interest bearing account because the Plan determined that the expenses associated with investing the assets would exceed the investment return.

Pursuant to section 2.5 of the Trust document, the trustee is entitled to receive contributions from Denny's in "such sums as from time to time are established by the Administrator." Section 2.5 further provides that, "[t]o the extent applicable or necessary, the Administrator shall base its

determination of these sums on actuarial principles, relying in good faith upon the recommendations of a qualified consultant or actuary as to the proper rate of contribution per Participant." You represent that the administrator has not obtained the recommendation of a consultant or actuary as to a contribution rate or established contribution requirements for Denny's. The trustee is empowered under the Trust documents to sue Denny's to collect unpaid employer contributions, but you indicated that, in the absence of any contribution requirements being set by the Administrator, the trustee would have to wait until the Trust was obligated to distribute bi-weekly vacation pay checks to sue Denny's for the amounts it needed to make those payments. Denny's, however, has voluntarily made sufficient contributions to the Trust to maintain a constant minimum account balance of at least $250,000.

You represent that the Plan distributes vacation pay by checks from a non-interest bearing bank account Denny's opened in its capacity as plan administrator. The bank account is designated the "Denny's Inc. Employee Vacation Trust Account" (Trust Account). Denny's determines the amount of vacation benefits to be paid in each two-week period, and generally deposits that amount into the Trust Account usually the day before the amount is paid out by the Trust in the form of vacation pay checks. The Trust Account issues vacation pay checks on the same bi-weekly schedule as Denny's normal payroll and the vacation pay checks include general payroll information from Denny's such as total wages paid and total year-to-date deductions for income taxes. The Plan covers approximately 32,000 participants, and pays approximately $8 million in benefits each year. The amount passed through the Trust

Account in a typical week equals or exceeds the $250,000 balance that Denny's maintains in the Trust.

Section 3(1) of Title I of ERISA defines the term "employee welfare benefit plan" to include: [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

In regulation 29 C.F.R. § 2510.3-1, the Department of Labor clarified the definition of "employee welfare benefit plan" by describing certain arrangements that would not constitute employee welfare benefit plans within the meaning of section 3(1) of ERISA. Section 2510.3-1(b) of the regulation describes certain exempt payroll practices, and specifically provides that an employer program of compensating employees for vacation benefits out of the employer's general assets is not a welfare plan covered under Title I of ERISA. In the preamble of the regulation, the Department stated that "[s]ection 2510.3-1(b) distinguishes welfare plans from employer payroll practices which, although related to benefits described in [section 3(1) of ERISA], are more closely associated with normal wages or salary. . . ." If vacation benefits are paid from a

source other than the general assets of the employer, the conditions of the safe-harbor regulation are not met. In the Department's view, assets held in a separate trust with terms such as those described above in the Plan's VEBA Trust document do not constitute general assets of the employer for purposes of the Department's regulation at 29 C.F.R. § 2510.3-1(b). Accordingly, the Plan would not be an exempt payroll practice under that regulation.

Vacation pay programs that fail to satisfy all of the conditions of the regulation, however, are not necessarily covered by Title I of ERISA. Rather, such programs are subject to further evaluation under section 3(1) of ERISA to determine whether the program includes the requisite elements to constitute an ERISA employee benefit plan. In that regard, the Supreme Court in Massachusetts v. Morash, 490 U.S. 107 (1989), explained that "[t]he reference to vacation payments in § 3(1) should be understood to include within the scope of ERISA those vacation benefit funds, analogous to other welfare benefits, in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk." Id. at 116. The Court also noted that extensive state regulation of vesting, funding and participation rights of vacation benefits may afford more protection for vacation benefits than ERISA, and indicated a reluctance to cause their preemption in situations where not clearly indicated. Id. at 119. Although the Morash court observed that "the creation of a separate fund to pay employees vacation benefits would subject a single employer to the regulatory provisions of ERISA[,]" id. at 114, the discussion in Morash suggests that the mere presence of a trust or other separate account from which vacation benefits are paid should not automatically result in ERISA coverage in the absence

of the trust providing genuine protections to the accrued benefits under the plan or otherwise presenting risks ERISA was intended to address.[1]

Accordingly, in the Department's view, to determine whether the use of a trust or other separate account to pay vacation benefits in a vacation pay program such as Denny's should result in the program being treated as an "employee benefit plan" subject to Title I of ERISA, the program should be evaluated to determine whether the trust is a bona fide separate fund, whether the trust has the direct legal obligation to pay benefits under the plan, whether there is a contribution obligation enforceable against the employer, and whether contributions are actuarially determined, established through collective bargaining, or otherwise bear a relationship to the plan's accruing liability.[2]

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[1] For example, in emphasizing that the Morash decision concerned vacation benefits paid by a single employer out of its general assets, the court observed that: "An entirely different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to laborers who regulatory [sic] shift their jobs from one employer to another. Employees who are beneficiaries of such a trust face far different risks and have far greater need for the reporting and disclosure requirements that the federal law imposes than those whose vacation benefits come from the same fund from which they receive their paychecks." Morash, 490 U.S. at 120. See also Alaska Airlines, Inc. v. Oregon Bureau of Labor, 122 F.3d 812 (9th Cir. 1997) (use of an "advance and recapture" trust in a single employer program did not convert sick leave program into an ERISA covered plan); Czechowski v. Tandy Corp., 731 F. Supp. 406 (N.D. Cal. 1990).

[2] This letter should not be read as expressing any view on whether an ERISA covered plan providing other welfare benefits through a pass-through trust would be treated as holding plan assets. See Advisory Opinion 92-24A (Nov. 6, 1992) and Advisory Opinion 99-08A (May 20, 1999).

In light of the above and based on the information submitted, the Department is unable to conclude that the Plan is an employee welfare benefit plan within the meaning of ERISA section 3(1). In this case, it appears that there is a separate trust with a direct legal obligation to pay the benefits due under the Plan. However, contributions do not appear to bear any relationship to the Plan's accruing liability and the administrator has not exercised its power under the Trust document to establish a rate of contribution per participant based on actuarial principles. The fact that the Trust documents may be read to impose a legal obligation on Denny's to contribute amounts every two weeks sufficient to pay vacation wages as they become due, and the fact that Denny's may voluntarily maintain a minimum balance of $250,000 in the Trust does not, in the Department's view, operate to change the essential nature of the Trust as a mere pass-through vehicle for the employer's payment of ordinary vacation wages or result in the Trust constituting a separate fund that provides genuine protections for the approximately $8 million in benefits that accrue under the plan each year.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,
John J. Canary
Chief, Division of Coverage,
Reporting, and Disclosure
Office of Regulations and Interpretations

No. 04-6

In the Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

PETITIONERS,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents concede that the Questions Presented are based on three independent circuit conflicts involving the proper interpretation of the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, and its relation to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* They also acknowledge that each of those conflicts presents an issue of recurring national importance. *See* Pet. 28-29; Brief Amicus Curiae of the Chamber of Commerce ("COC Br.") at 10-12. Respondents base their opposition on the claim that "this case does not present this Court with the opportunity to resolve [the] differences that ... exist among the circuits" because Petitioners did not file a motion for injunctive relief before the state action was initiated and Respondents' state court complaint did not seek recovery of funds from an ERISA trust. Opp. 9. The Fourth Circuit, however, did not consider either of those facts to have any bearing on the outcome of the case. It unequivocally held that *no* ERISA action is ever exempt from the AIA unless the federal court *grants* a request for equitable relief before the state action is filed. Thus, this case squarely presents this Court with the opportunity to determine whether that interpretation of the AIA is correct. Indeed, the Fourth Circuit expressly acknowledged the relevance of two of the three conflicts at issue in this petition (and did not address the third). Pet. App. 6-7. Any reasonable interpretation of the conflicting decisions confirms that Petitioners' complaint would not have been dismissed in any of the seven circuits that have rejected the Fourth Circuit's approach.

I. THE *BARANCIK* RULE APPLIES HERE

1. In Respondents' novel view, the rule in *Barancik v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir. 1973), is triggered only when a federal plaintiff files a *motion* for a preliminary injunction or temporary restraining order. Opp. 6-7. That argument is founded on a manufactured distinction between complaints and motions requesting injunctive relief. Respondents cite no case that relies on that supposedly dispositive procedural difference, and there

is nothing to suggest that any circuit ever would. Indeed, the Fourth Circuit plainly did not read the *Barancik* rule as Respondents do. Instead, it agreed with Petitioners' assertion that adoption of the *Barancik* rule would permit their action to proceed, finding that the Seventh Circuit "so held" in *Barancik*. Pet. App. 13a-14a. Similarly, the Fifth and Sixth Circuits, which follow the same rule as the Fourth, also explicitly interpret *Barancik* to apply to any first-filed federal complaint seeking injunctive relief.[1]

As the Fourth Circuit explained, Petitioners' complaint was the relevant pleading under the rule it adopted and under *Barancik*. The court held that the AIA "rendered the district court powerless to issue any of the relief Denny's requested" because the complaint "seek[s] to enjoin state officials." Pet. App. 12a n.8. If requesting injunctive relief in a complaint is enough to trigger dismissal under the AIA, it is also enough to trigger protection under the *Barancik* rule, as the Fourth Circuit recognized. Pet. App. 13a-14a.

Respondents' argument is based on a mistaken reading of *Barancik* that no court has adopted. In *Barancik*, the federal plaintiff filed a complaint "pray[ing] for damages and a declaratory judgment." 489 F.2d at 934. That complaint did not seek injunctive relief. Instead, the first time the plaintiff invoked the court's injunctive powers was when he filed a motion for a preliminary injunction three months later. Because the complaint had not sought injunctive relief, the timing of the motion was crucial to the outcome of the case. Had a state court action been initiated between the filing of the complaint (which did not request injunctive relief triggering the AIA) and the filing of the motion (which did), the AIA would have barred the injunction because the state suit would have predated the request for injunctive

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[1] *See Martingale LLC v. City of Louisville*, 361 F.3d 297, 304 (6th Cir. 2004) (AIA bars injunctive relief when "state court litigation commenced after the federal suit was filed"); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 (5th Cir. 1993) ("The *Barancik* court ... held that the Act *does not apply* where the federal suit is filed first."), *cert. denied*, 511 U.S. 1032 (1994).

relief. That chronology explains why then-Judge Stevens stated that "[t]he mere fact that the federal complaint was filed before the state proceeding was commenced is not sufficient to avoid the statutory bar [of the AIA]." *Id.* at 936. Respondents take that passage out of context and misconstrue it to suggest a distinction between complaints and motions, but Judge Stevens drew no such distinction.[2] The relevant difference in *Barancik* was between a request for injunctive relief filed before the relevant state court action and a request filed after that state court action. As Respondents concede, Petitioners requested injunctive relief before Respondents filed their state action. Opp. 2-3.

2. The First and Eighth Circuits have not endorsed Respondents' view either. To the contrary, the analysis in *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988), shows that the First Circuit regarded the filing of the complaint seeking injunctive relief—and not the plaintiff's motion for a temporary restraining order—as the event triggering protection under *Barancik*. The court stated that "[a]t 11:05 A.M. ... Hyde Park filed in the federal district court its verified *complaint seeking declaratory and injunctive relief*." *Id.* at 840 (emphasis added). Later that day, High Voltage "presented a complaint" in state court. The First Circuit held that "[s]uch an action is precisely the sort of state statutory enforcement that Hyde Park sought to enjoin in its *federal action*," and applied *Barancik* to exempt the prior-filed federal action from the AIA's reach. *Id.* at 840-41. That language confirms that a prior-filed federal complaint seeking injunctive relief (like Petitioners' here) is sufficient to avoid the AIA under the *Barancik* rule.

Similarly, in *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122 (8th Cir. 1982), the Eighth Circuit explicitly

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[2] Respondents note Judge Stevens's citation of *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922). Opp. 8. The complaint there sought "a money judgment only." 260 U.S. at 228. The plaintiff filed for injunctive relief only after the state suit was initiated. That is precisely the scenario Judge Stevens distinguished in *Barancik*, which is not present here.

rejected any distinction among various methods of invoking injunctive relief. That court held that "[t]he Anti-Injunction Act is inapplicable when a federal court has first obtained jurisdiction of a matter in controversy *by the institution of suit*." *Id.* at 1127 (emphasis added). The Eighth Circuit made clear that "the question whether state actions are 'pending' is appropriately answered by reference to the date on which injunctive relief is sought in federal court," not (as Respondents claim) the date a motion for preliminary injunctive relief is filed. *Id.* Thus, the First and Eighth Circuits recognize that the *Barancik* rule applies here.

4. Respondents offer no rationale for their manufactured distinction, which is hardly surprising, because their approach would cause the very problems that led Judge Stevens to adopt the *Barancik* rule. *Barancik* explained that the rule was necessary because federal plaintiffs should not be required to seek temporary restraining orders to protect the injunctive powers of federal courts. As if anticipating Respondents' view, Judge Stevens wrote, "It may be argued that the [AIA] requires the federal court to protect its authority by promptly issuing a temporary restraining order. But such a construction might encourage the liberal granting of the kind of protective orders the statute was intended to prevent." 489 F.2d at 937-38. The *Barancik* court contemplated and rejected the idea that motions for preliminary injunctive relief—like motions for temporary restraining orders—should be necessary to secure equitable relief in federal courts. Petitioners would read *Barancik* to require just that.

II. THE SECOND AND SIXTH CIRCUITS WOULD APPLY THE ERISA EXCEPTION

Respondents argue that ERISA is not an "expressly authorized" exception under *Mitchum v. Foster*, 407 U.S. 225 (1972), and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). Opp. 10-12. Under Respondents' reading, parties could use the AIA to defeat a cause of action expressly given to ERISA fiduciaries exclusively in federal court (and frustrate ERISA's rule of nationwide uniformity)

simply by filing a state court action before the federal court orders relief. That interpretation of the AIA is surely incorrect, but the only question at this stage is whether review should be granted to resolve this question. Respondents concede that five circuits have considered the issue and adopted conflicting rules. Pet. 19-20. This case squarely presents the opportunity to resolve that conflict.

1. Petitioners' complaint would not have been dismissed under the Second Circuit's holding in *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd on other grounds sub nom. Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986). Pet. 21. Respondents do not disagree but suggest that precedent should be disregarded because the court's analysis was not extensive. It was sufficient for the Fourth Circuit, however, which explicitly acknowledged that *Gilbert* conflicts with its interpretation of the AIA. *See Employers Resource Mgt. Co. v. Shannon*, 65 F.3d 1126, 1132 (4th Cir. 1995) (noting that "[o]ther circuits are divided on the issue of whether ERISA carves an exception into the Anti-Injunction Act" and citing *Gilbert* for the proposition that "ERISA constitutes an exception to the Anti-Injunction Act"), *cert. denied*, 516 U.S. 1094 (1996). Nor do Respondents deny that the Second Circuit has followed *Gilbert* for nearly twenty years. They cite no case in that circuit which questions or distinguishes *Gilbert*'s relevant holding, because there is none. Petitioners' claims would have been exempted from the AIA if the Second Circuit had decided this case. *Gilbert*, 765 F.2d at 329.

2. Petitioners' claims also would have survived the AIA in the Sixth Circuit. That court held that ERISA satisfies the *Mitchum* and *Vendo* tests because it combines expansive preemption provisions with exclusive federal jurisdiction over actions brought by fiduciaries to "enjoin any act or practice which violates" the terms of an ERISA plan. *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980) ("We conclude that ERISA meets both prongs of the *Mitchum* test."). The Sixth Circuit held that ERISA authorizes an exception to the AIA whenever a state court

action would make it "impossible for a fiduciary ... to carry out its responsibilities under ERISA." 623 F.2d at 459.

The Fourth Circuit made no suggestion that Petitioners would not prevail under *Buha*.[3] Nevertheless, Respondents offer three reasons for their claim that successfully resolving their California state court action would not make it impossible for Petitioners to carry out their fiduciary responsibilities. None has any merit.

First, Respondents claim that their state court action is distinguishable from the state action in *Buha* because it does not seek recovery from an ERISA trust fund and they have not sued Denny's in its fiduciary capacity. Opp. 15. That argument relies on Respondents' assertion that Petitioners' plan is not an ERISA plan. If it is, as Petitioners have sufficiently alleged and this Court must therefore assume, then Denny's is an ERISA fiduciary that would be required under the "cease and desist order" sought by Respondents to pay benefits in violation of the terms of an ERISA plan. Pet. 4. Indeed, the Fourth Circuit assumed that Respondents' state court action would violate ERISA and nonetheless dismissed the case. Pet. App. 11a.

Second, Respondents assert that Petitioners' fiduciary responsibilities are not implicated because Petitioners have the opportunity to raise a preemption defense in state court, whereas no such opportunity was present in *Buha*. Opp. 15-16. Respondents incorrectly contend that the defendant in that state action was not an ERISA fiduciary and that there was no opportunity to raise a preemption defense. Opp. 15.

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[3] Respondents incorrectly contend that Judge Williams found that this complaint would have been dismissed in the Sixth Circuit. Judge Williams observed that "[i]f ERISA was an 'expressly authorized' exception to the AIA [when fiduciaries seek to prevent application of state law], then the AIA likely would not apply to this case as Denny's has argued emphatically *that it will be unable to carry out its responsibilities under ERISA* if it is subjected to California labor law." Pet. App. 21a (emphasis added). That is the rule that governs in *Buha*, but Judge Williams found that approach was "not available" after the Fourth Circuit's holding in *Employers Resource Management*. Pet. App. 21a.

To the contrary, the defendant in the state court action at issue in *Buha* was a bank that served as an ERISA trustee of General Motors' pension fund. 623 F.2d at 457. The trustee accordingly could have raised a preemption defense, and there was no suggestion that General Motors could not have intervened in the state suit.

More important, the Sixth Circuit did not hold that the availability of a preemption defense is the test for whether a fiduciary can carry out its duties under ERISA. It held that the "equitable character" of an ERISA plan is directly implicated when "state and local laws ... might frustrate its goals." *Id.* at 459. As *Buha* recognized, Congress gave fiduciaries the right to seek federal court protection from state enforcement actions that violate ERISA's preemption provisions. *Id.*; *see also Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 (1983) ("Congress presumably determined that a right to enter federal court was necessary to further [ERISA's] purposes."). As the Fourth Circuit explained below, that right of fiduciaries to bring federal actions is important because a state suit may violate ERISA even if a fiduciary can raise a preemption defense. *See* Pet. App. 11a ("[A] state suit to enforce a state law against an ERISA plan may well violate ERISA and the plan."). When a plan's fiduciary is threatened with a state enforcement action, it faces a "Hobson's choice." *Id.* It must either "obey the state law, and risk violating the provisions of the plan []and hence ERISA ... or disobey the state law and then raise 'ERISA preemption as a defense ...' and 'risk breaking the [state] law.'" *Id.* (citation omitted). Neither of those options is acceptable. COC Br. 5 (fiduciaries "are bound to act in the interest of the participants and beneficiaries of the plan at all times ... they do not have the luxury of waiting to be sued by state authorities for violations of state law"). The only way for Petitioners to ensure they are carrying out their fiduciary duties is to seek declaratory and injunctive relief in federal court.

Third, Respondents argue that Petitioners' vacation benefits policy does not qualify as an ERISA plan and that

"[s]uch a finding is required under *Buha*." Opp. 16. That argument is ironic given that Petitioners brought their federal action precisely to litigate the merits of that question. More to the point, the ultimate resolution of that issue is irrelevant to this Court's analysis of the petition. Petitioners' federal complaint sufficiently alleges, with supporting facts, that Petitioners maintain and administer an ERISA plan. The courts below properly accepted those well-pleaded facts as true and construed them in Petitioners' favor. *See* Fed. R. Civ. P. 8(f); Pet. App. 7a n.4 ("presum[ing] Denny's is an ERISA fiduciary" without drawing "any conclusion as to the merits of Denny's allegation that the Plan is an ERISA plan"). Because this case arises on appeal from a motion to dismiss, this Court, too, assumes the truth of Petitioners' well pleaded facts and construes them in their favor. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 770 (1993) ("Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true."). Respondents do not suggest that the Fourth Circuit erred on this point, and their challenge to the status of Petitioners' plan is therefore misplaced.[4] Thus, this case squarely presents the opportunity for this Court to resolve the circuit conflict stemming from the confusion

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[4] Respondents' reliance on the Department of Labor's advisory opinion is inappropriate because it relates to the merits of the action, not the availability of relief under the AIA. In fact, the opinion does not resolve the question whether Petitioners' plan is an ERISA plan, as Respondents claim. *Compare* Opp. App. 32 (concluding that "the Department is unable to conclude that the Plan is an employee benefit plan within the meaning of ERISA section 3(1)") *with* Opp. 16. Even if the opinion were adverse to Petitioners, Respondents cannot rely on it as an authoritative agency interpretation. *See* Opp. App. 32 (citing ERISA Procedure 76-1, § 10, which states that only parties requesting opinion—here, Petitioners—may rely upon it). Moreover, Respondents misstate the opinion's reasoning. The opinion suggests (without support) that vacation benefit policies may not qualify as ERISA plans if they do not require advance actuarial funding, which contradicts the plain text of ERISA, 29 U.S.C. § 1081, and would deny ERISA status to numerous types of benefit policies that are widely believed to qualify as ERISA plans.

created by *Mitchum* and *Vendo* in the ERISA context; to determine whether ERISA ever authorizes an exception to the AIA; and to determine the nature of the claims that fall within the scope of that exception.

III. IN OTHER CIRCUITS THE AIA WOULD NOT BAR ALL RELIEF PETITIONERS REQUEST

1. Respondents argue that Petitioners have not met the requirements established in *Thiokol Chemical Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328 (3d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). The Third Circuit held that the AIA does not bar declaratory relief if the state suit turns on a question of federal law; federal courts are generally more experienced in handling that question; and the state court "manifests willingness to hold its hand pending [a] federal decision" on that question. *Id.* at 1332. *First*, as Respondents recognize, their state court action turns on the federal question of whether ERISA preempts California's vacation pay statute. *Second*, federal courts are "likely to be more familiar and experienced" in handling ERISA actions. Even if state courts have jurisdiction over ERISA preemption defenses, Congress gave federal courts exclusive jurisdiction over suits brought by fiduciaries, which strongly suggests that those courts are better equipped to adjudicate the questions they present. COC Br. 10. *Third*, declaratory relief here could not have the same effect as a "stay" of the proceedings—as the AIA's text requires—because the state court made its own decision to stay the proceedings *three times*. That stay remains in effect. This case therefore meets all of the conditions set forth by the *Thiokol* court.

2. The Fifth Circuit also would have authorized declaratory relief in this case. In *Travelers Insurance Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774 (5th Cir. 1993), the court held that the AIA does not bar declaratory relief "consistent with the purposes of the Declaratory Judgment Act [("DJA")]." *Id.* at 777. Petitioners filed suit in federal court to clarify the nature of their fiduciary responsibilities and to prevent a multiplicity

of suits in more than thirty-six states. Pet. 27. Those purposes are consistent with the aims of the DJA, which, as most federal courts have recognized, was designed to promote judicial economy by reducing legal uncertainty. *See, e.g., Kunkel v. Continental Cas. Co.*, 866 F.2d 1269, 1275 (10th Cir. 1989) (holding that "a court in the exercise of its discretion should declare the parties' rights and obligations when the judgment will (1) clarify or settle the legal relations in issue and (2) terminate or afford relief from the uncertainty giving rise to the proceeding").

Respondents dispute that conclusion by claiming that Petitioners engaged in "procedural gamesmanship" by selecting the district court as the forum for their action. Respondents cannot be referring to Petitioners' choice of a federal forum, which is required under ERISA. 29 U.S.C. § 1132(e)(1). Nor can Respondents seriously complain about Petitioners' geographic choice of South Carolina. ERISA's venue provisions plainly authorize fiduciaries to bring actions "in the district where the plan is administered," and Petitioners' plan is administered in South Carolina. *Id.* § 1132(e)(2). Moreover, Respondents' claim that this action was filed in South Carolina to "nullify the other party's advantage in state court," Opp. 20, rings hollow.[5] There was no state court suit pending when Petitioners filed their federal claim, so Respondents never enjoyed any "advantage." Petitioners' claims for declaratory relief, prohibited by the Fourth Circuit, would have been permitted in the Third and Fifth Circuits. This Court should grant certiorari to resolve that conflict and clarify what types of declaratory relief, if any, the AIA reaches.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the petition for certiorari should be granted.

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[5] Respondents' assertion also begs interesting questions: Why did Respondents have an "advantage" in state court? And is requiring ERISA fiduciaries to litigate their ERISA claims in a disadvantageous state court forum consistent with ERISA's fundamental goals?

Respectfully submitted,

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In The
Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

Petitioners,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States (the "Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of the petition for certiorari in this case. A copy of the proposed brief is attached. The consent of the attorney for petitioners has been obtained. The consent of the attorney for the respondents was requested but refused. In support of this motion, the Chamber notes the following:

The Chamber is the world's largest business federation representing an underlying membership of nearly three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to American business.

The Chamber's membership has an interest in this case because nearly all of its members maintain employee benefit plans covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). They are vitally interested in preserving the uniform, national regulation of employee benefit plans under ERISA and avoiding the confusion, risk and attendant cost of having to comply with various state laws.

In many instances, the members themselves serve as fiduciaries with respect to their plans, in capacities such as plan administrator or trustee and bear direct liability for breaches of fiduciary responsibility in the administration of those plans. In other instances, they appoint the fiduciaries and bear indirect responsibility either through

a duty to supervise their appointees or by way of indemnification. Regardless of the form, however, the members commonly bear ultimate responsibility for breaches of fiduciary responsibility, such as failure to follow applicable law, so it is critically important that they have available, for their own protection, the right to seek instructions from a federal court under ERISA as to the pre-emption of state law.

While the petition addresses the Anti-Injunction Act in general and establishes the conflict among the circuits, the Chamber submits this brief in order to bring to the Court's attention the critical importance of the decision in the particular area of fiduciary responsibility under ERISA. Accordingly, the Chamber respectfully moves the Court to grant this motion and allow the filing of the attached brief.

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States (the "Chamber") is identified in the preceding Motion for Leave to File Brief Amicus Curiae.[1] Its interest in this matter is also expressed in that motion and thus will not be restated here.

STATEMENT OF THE CASE

This is a case where the fiduciary of an employee benefit plan sought instructions from a federal court on the pre-emption of state law, as he is entitled to do under ERISA for his own protection. But the state authorities subsequently filed a state-court enforcement action and persuaded the Court of Appeals that the fiduciary's pending federal-court action should be dismissed, relying on the Anti-Injunction Act.

The employee benefit plan at issue is a fiduciary's nationwide vacation benefit plan that is designed as an ERISA plan. The State of California alleges that the vacation benefit plan violates the California Labor Code. The fiduciary filed an action in federal district court in South Carolina seeking instruction on ERISA preemption and requesting declaratory and injunctive relief. Three weeks later the State of California filed a complaint against the fiduciary in California state court seeking enforcement of the California Labor Code. The State of California then moved to dismiss the federal court action

[1] Pursuant to Sup. Ct. Rule 37.6, the Chamber represents that neither petitioner nor respondent assisted the Chamber or its counsel, in any way, even with expenses, in preparing or submitting this brief.

contending that, *inter alia*, the Anti-Injunction Act compelled dismissal.

The district court dismissed the case, holding that the court lacked personal jurisdiction. On appeal the Fourth Circuit held that the district court did indeed have jurisdiction, but nonetheless found that the case was otherwise barred by the Anti-Injunction Act. The decision below thus, in practical effect, deprives the fiduciary of his ERISA-protected right to instructions from a federal court on matters of ERISA pre-emption.

ARGUMENT

The Petition Should Be Granted to Preserve, on a Uniform, National Basis, the Critical Right of Fiduciaries under ERISA to Seek Instructions From the Federal Courts on the Pre-Emption of State Laws, as Mandated by Congress in ERISA.

It is beyond dispute that Congress has completely occupied the field of employee benefit plans for federal regulation. The language of the statute's "preemption clause" clearly provides that ERISA "shall supersede any and all State laws in so far as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court acknowledged the power of ERISA's preemption clause in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983), quoting Rep. Dent and then Sen. Williams:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out

> the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong.Rec. 29197 (1974). Senator Williams echoed these sentiments: "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law."

It is equally beyond dispute that state legislatures seek to protect their citizens with regard to employee benefits and therefore regularly pass laws that impinge on the federal domain. Some state legislators may be unaware of ERISA pre-emption; others may have a good faith doubt about the extent of ERISA pre-emption in the particular case; and still others may hope that the courts will recognize an exception for their efforts.

The area of vacation benefits is particularly suited to misunderstanding, because the text of ERISA broadly identifies plans that provide vacation benefits as "employee welfare benefit plans" covered by ERISA, while a regulation of the Secretary of Labor exempts most vacation plans from ERISA coverage. That is to say, the text of ERISA flatly defines as "employee welfare benefit plans" any "plan, fund or program" that provides "vacation benefits." ERISA sec. 3(1), 29 U.S.C. § 1002(1). But a regulation administratively exempts all such plans where

the benefits are paid from the general assets of the employer. 29 C.F.R. § 2510.3-1(b)(3)(i).[2]

Just like *Massachusetts v. Morash*, 490 U.S. 107 (1989), this case ultimately involves a dispute over whether an employer's vacation benefit plan is covered by ERISA. The plan clearly satisfies the statutory definition of "employee welfare benefit plan" and just as clearly does not satisfy the regulatory exemption (because benefits are not paid from the general assets of the employer). Yet the State of California insists that the plan is not covered by ERISA.[3]

Whatever the motivation of the state legislators, there is a recurring need for administrators and other fiduciaries of employee benefit plans to clarify the status of their plans under ERISA and establish that particular state laws are pre-empted by ERISA. The mechanism for doing so is an action under section 502(a)(3) of ERISA for appropriate equitable relief to enforce the provisions of ERISA, principally the pre-emption provision in section 514. ERISA sec. 502(a)(3), 29 U.S.C. § 1132(a)(3).[4] Congress decided that such actions should be heard only in federal court. ERISA sec. 502(e)(1), 29 U.S.C. § 1132(e)(1).

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[2] This Court upheld the regulation in *Massachusetts v. Morash*, 490 U.S. 107 (1989).

[3] As this Court noted in *Massachusetts v. Morash*, 48 states have enacted laws regulating vacation pay. 490 U.S. at 109, n.2 (1989).

[4] Section 502(a)(3) of ERISA provides that "A civil action may be brought . . . by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan."

It is important that equitable relief be available to administrators and other fiduciaries of employee benefit plans under ERISA in federal court. The principal reason is that such individuals function as fiduciaries under ERISA. As fiduciaries, they are bound to act in the interest of the participants and beneficiaries of the plan at all times, at the risk of personal liability for any breach of fiduciary responsibility (*see Pegram v. Herdrick*, 530 U.S. 211 (2000)), which means they do not have the luxury of waiting to be sued by state authorities for violations of state law.

Acting in the interest of participants and beneficiaries means, among other things, spontaneously determining the applicability of all laws and obeying them. Unlike an adversary in a commercial context, the fiduciary may not sit back and say, "So sue me." The fiduciary is held to a higher standard: knowing the law and acting accordingly. As this Court has noted with approval:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Pegram v. Herdrick, 530 U.S. at 224-5, quoting Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458 (1928).

This unique duty of loyalty is enforced by a unique remedy: personal liability of the fiduciary for any breach. ERISA sec. 409(a), 29 U.S.C. § 1109(a). Congress sought to ensure that the consequences of fiduciary breach would not be visited upon the participants in the plan but would

be borne by the fiduciary personally. So all penalties, damages and liabilities flowing from a violation of law fall on the fiduciary personally, not on the plan, and any provision for the plan to indemnify the fiduciary against such liability is void as against public policy. ERISA sec. 410(a), 29 U.S.C. § 1110(a).

This combination of a higher standard of responsibility and personal liability for any breach was not invented by ERISA but has long been a feature of the common law of trusts, from which the ERISA requirements of fiduciary responsibility were borrowed. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-112 (1989). As explained in Scott on Trusts (cited with approval in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. at 112):

> There are situations in which the trustee is liable for breach of trust even though he has not intentionally committed a breach of trust and has not been negligent. . . . The question not infrequently arises whether a trustee is liable for breach of trust where he acted under a mistake of law. It is clear enough that where he fails to perform the duties imposed on him, it is no defense that his failure was due to a mistake of law if he was negligent in making the mistake. . . . Where the trustee makes a mistake of law as to the extent of his duties or powers as trustee, it is no defense that he relied upon the advice of an attorney. . . . It is immaterial whether the mistake is as to statutory or common-law rule of law. . . .

3 W. Fratcher, Scott on Trusts § 201.

In response to the need of fiduciaries to know their duty in advance, without putting their personal assets at risk for a misstep, the common law of trusts accorded

fiduciaries the right to seek instructions from a court of competent jurisdiction. Scott on Trusts explains that the right to seek instructions has always been recognized as the necessary *quid pro quo* for the fiduciary's strict personal liability:

> Ordinarily where a person is in doubt as to his duties, he has no way of determining whether an act would be in violation of his duty except by doing the act and later resisting a claim brought against him for violation of duty. . . . [H]owever, courts of equity in the exercise of their jurisdiction over the administration of trusts have been accustomed to give instructions to trustees at their request as to their duties and powers. A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to the instructions of the court as a protection.

3A W. Fratcher, Scott on Trusts § 259. Specifically as applied to questions of law, Scott on Trusts underlines the importance of the right to seek instructions:

> The mere fact that the trustee makes a mistake of law as to the extent of his duties or powers does not preclude the beneficiaries from holding him liable for breach of trust, if he exceeded his powers or otherwise violated his duties as trustee. Such a rule would impose a hardship on the trustee, were it not that when he is reasonably in doubt as to the extent of his powers and duties he can obtain instructions from the court that will protect him.

Ibid.

The common-law right to seek instructions from a court of competent jurisdiction was preserved under ERISA in the form of an action by a fiduciary under section 502(a)(3) for appropriate equitable relief. That section permits a fiduciary of an employee benefit plan to seek declaratory and injunctive relief regarding the application of state law to the plan which the fiduciary administers, thus removing the need for the fiduciary to act at his peril and, if subsequently determined to be wrong, to suffer personal liability.[5]

Fiduciaries regularly make use of that provision to determine whether state law applies to the plans which they administer, as this Court has seen more than once. *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997) (fiduciaries sought declaratory judgment that ERISA pre-empted New York State tax on gross receipts of health care facilities), *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (fiduciaries sought declaratory judgment that ERISA pre-empted New York State law imposing surcharges on hospital rates).

Such actions are common in the lower courts. *Insurance Bd. Under Social Insurance Plan of Bethlehem Steel Corp. v. Muir*, 819 F.2d 408 (3d Cir. 1987) (administrator sought declaratory judgment that ERISA pre-empted Pennsylvania law that related to coverage for newborn children, psychological testing service, maternity and services by certain health care providers); *Blue Cross and*

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[5] As this Court noted in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989), in the context of plan interpretation, "A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court."

Blue Shield of Alabama v. Hobbs, 209 F.R.D. 218 (M.D. Ala. 2002) (fiduciary sought declaratory judgment that ERISA pre-empted Alabama Physician Assistant Statute); *Mitchell Energy & Development Corp. v. Fain*, 172 F.Supp.2d 880 (S.D. Tex. 2001) (fiduciary sought declaratory judgment that ERISA pre-empted Texas Labor Code as applicable to voluntary separation agreements under ERISA-covered plan); *Fixx v. United Mine Workers of America*, 645 F.Supp. 352 (S.D.W.Va. 1986) (fiduciaries sought declaratory judgment that ERISA pre-empted West Virginia law prohibiting cancellation of benefits while employee is on temporary total disability); *St. Paul Electrical Workers Welfare Fund v. Markman*, 490 F.Supp. 931 (D. Minn. 1980) (fiduciaries sought declaratory judgment that ERISA pre-empted Minnesota Comprehensive Health Insurance Act).

An alternative mechanism serving the same purpose is an action for declaratory judgment, usually by the employer, under the general federal question jurisdiction of 28 U.S.C. § 1331. This Court saw such an action in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (state anti-discrimination law), and examples abound in the lower courts. *Wright Electric, Inc. v. Minnesota State Board of Electricity*, 322 F.3d 1025 (8th Cir. 2003) (state law regarding work by unlicensed electricians allegedly in conflict with ERISA regulation of apprenticeship plans); *Children's Hospital v. Whitcomb*, 778 F.2d 239 (5th Cir. 1985) (state law requiring parity in benefits for physical and mental illness); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983) (state law regarding funding of benefits); *Pharmaceutical Care Management Ass'n v. Rowe*, 307 F.Supp.2d 164 (D. Me. 2004) (state law regulating the processing of

prescription drug claims); *Hewlett-Packard Co. v. Barnes*, 425 F.Supp. 1294 (C.D. Cal. 1977) (California Knox-Keene Health Care Service Plan Act of 1975). Since those actions serve the same purpose as an action by a fiduciary, and since the decision below cuts off those actions just as surely as actions by fiduciaries, the Court may properly view that category of cases as compounding the destructive consequences of the decision below.

Moreover, Congress reserved to the federal courts the function of providing instructions to fiduciaries of ERISA-covered employee benefit plans. While state and federal courts have concurrent jurisdiction of claims for benefits by participants, the federal courts have exclusive jurisdiction of actions by fiduciaries to enforce ERISA. ERISA sec. 502(e)(1), 29 U.S.C. § 1132(e)(1). Since ERISA establishes a uniform, national law of fiduciary responsibility, Congress was understandably intent on assuring a uniform, national application of that law, sidestepping state courts' unfamiliarity with, or even downright hostility to, ERISA.

It is important, therefore, not only that fiduciaries have available a cause of action under ERISA to enforce ERISA but that they have recourse to the federal courts to do so. In the federal courts, fiduciaries find a higher level of experience with ERISA and a freedom from parochial state concerns that might stand in the way of full enforcement of ERISA in accordance with its terms.

The decision below deprives fiduciaries of ERISA-covered plans of this important ability to obtain instructions on their duties under ERISA from a federal court. If allowed to stand, the decision below would teach the state authorities in the affected circuits that, when faced with

an action by a fiduciary in federal court under ERISA to enforce the pre-emption provision of ERISA, all the state authority need do is file an action in state court to enforce the state law and then move for dismissal of the federal action of the fiduciary. Within the Fourth Circuit (or any other circuit that follows the same rule), the fiduciary's federal action will be dismissed and the fiduciary will be reduced to defending a state-court action.

Thus, the decision below gives state authorities within the Fourth Circuit (or any other circuit that follows the same rule) the practical ability to prevent a fiduciary from seeking instructions from a federal court under ERISA. Such a result prevents the fiduciary from receiving an advance determination on the applicability of state law, instead compelling the fiduciary to knuckle under to state law or risk personal liability for any violation. And it deprives the fiduciary of the federal forum that Congress guaranteed him in ERISA.

If fiduciaries are deprived of their opportunity to seek instructions from the federal courts, as is their right under ERISA, the net effect will be the very set of problems that Congress sought to avoid in ERISA by reserving the field of employee benefits plans for exclusive federal regulation –

– pressure on fiduciaries to conform to state law, lest the fiduciary resist, be proved wrong and suffer personal liability, in contrast to the clear intent of Congress to provide federal rules under ERISA;

– a patchwork quilt of regulation varying according to state, instead of the uniform application of federal law that Congress intended; and

– reluctance by fiduciaries to serve, coupled with additional administrative cost for those who do, in contrast to the effort of Congress to reduce cost and simplify administration through a single set of federal guidelines.

CONCLUSION

The ERISA regime of fiduciary responsibility, with its uncompromising standard of loyalty and personal liability for breach, absolutely requires as a *quid pro quo* that the fiduciary have available an effective means of determining in advance whether ERISA pre-empts particular state laws. The decision below deprives the fiduciary of that opportunity, and the conflict among the circuits should be resolved by this Court in a manner that preserves access to the federal courts for fiduciaries as Congress mandated.

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IN THE
Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,
Petitioners,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF THE NATIONAL COUNCIL OF CHAIN RESTAURANTS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* and BRIEF FOR THE NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE NATIONAL COUNCIL OF CHAIN RESTAURANTS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37, the National Council of Chain Restaurants (hereinafter "NCCR") respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in support of the petition for writ of *certiorari* in the above captioned case. The Petitioners have consented to NCCR's participation in this matter. The Respondents have withheld their consent, necessitating this Motion.

NCCR is a national trade industry group representing the interests of twenty-four of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, the NCCR member companies and their franchisees employ in excess of three million individuals in all fifty states. NCCR takes a particular interest in those legal matters where a potential outcome could adversely affect the policies, practices, or legal rights of NCCR member companies.

All of NCCR's member companies administer employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* [1]

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[1] NCCR understands that the Respondents may have withheld consent based on their position that the Petitioners' employee benefit plan at issue is not an ERISA plan. This is not the appropriate stage of litigation to raise such an argument. The Fourth Circuit addressed this issue when it stated, ". . . we presume Denny's is an ERISA fiduciary for purposes of jurisdiction." *Denny's, Inc. v.* Cake, 364 F.3d 521, 525 n.4. The court concluded the discussion of this issue by stating that "we leave any objections [to whether Denny's plan is an ERISA plan] to be dealt with 'as a direct attack on the merits of the plaintiff's case.'" *Id., citing United*

These ERISA plans provide billions of dollars of employee benefits to members' employees and beneficiaries. While members incur significant costs and bear substantial administrative burdens in creating and administering ERISA plans, members receive various protections from ERISA provisions that enable them to reduce their administrative costs and reduce their exposure to legal liability, including ERISA's policy of providing "ready access to Federal courts," preemption of state laws, and empowerment to seek equitable relief.

This case has a direct bearing on the effectiveness of ERISA's preemption and equitable relief protections. As a representative of employers administering ERISA plans, NCCR is well suited to share with the Court the practical impact the erosion of these protections may have on employers. For these reasons, NCCR respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted.

Respectfully submitted,

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States v. North Carolina, 180 F.3d 574, 580 (4th Cir. 1999) (internal quotation marks and citation omitted).

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IN THE

Supreme Court of the United States

No. ___

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

Petitioners,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

As stated in the accompanying motion for leave, the National Council of Chain Restaurants (hereinafter "NCCR")[1] is a national trade industry group representing the

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party. No monetary

interests of twenty-four of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these twenty-four companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, NCCR's member companies and their franchisees employ in excess of three million individuals in all fifty states. NCCR takes a particular interest in those legal matters where a potential outcome could adversely affect the policies, practices, or legal rights of NCCR member companies.

All of NCCR's member companies administer employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* These ERISA plans provide billions of dollars of employee benefits to members' employees and beneficiaries. While members incur significant costs and bear substantial administrative burdens in creating and administering ERISA plans, members receive various protections from ERISA provisions that enable them to reduce their administrative costs and reduce their exposure to legal liability, including ERISA's policy of providing "ready access to the Federal courts," preemption of state laws, and empowerment to seek equitable relief.

This case has a direct and adverse bearing on the effectiveness of ERISA's preemption and equitable relief protections. This erosion of these protections is of significant interest and concern to NCCR and its members.

SUMMARY OF ARGUMENT

NCCR is confident that the Petitioners will persuasively argue the legal reasons that the Court should grant their

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contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel.

petition to resolve the conflict among the Circuit Courts involving the interpretations of the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, at issue in this matter. NCCR would like to emphasize, however, two critical praetical points. First, ERISA's creation of "ready access to the Federal courts," in addition to and in connection with its preemption and equitable relief provisions, are of vital importance to employers who create and administer ERISA plans. Second, the Fourth Circuit case below erodes the effectiveness of these protective provisions and thereby acts as a disincentive to employers to create and administer costly and complicated ERISA plans. The results of this disincentive is the potential reduction or elimination of valuable benefits to employees across the country.

NCCR urges this Court to grant the petition for writ of *certiorari* and resolve the uncertainty that currently exists for employer fiduciaries with regard to their protections under ERISA.

ARGUMENT

I. ERISA'S PREEMPTION AND EQUITABLE RELIEF PROVISIONS ENCOURAGE EMPLOYERS TO CREATE UNIFORM EMPLOYEE BENEFIT PLANS.

The United States Department of Labor, which administers portions of ERISA, states that Title I of ERISA was "enacted to address public concern that funds of private pension plans were being mismanaged and abused."[2] Recent corporate scandals have jeopardized financially-secure retirements for

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[2] Employee Benefits Security Administration, *History of EBSA and ERISA* (visited July 26, 2004) <http://www.dol.gov/ebsa/aboutebsa/history.html>.

tens of thousands of Americans. The resulting damages have been redressed, in part, by the remedy provisions of ERISA. In the wake of such scandals, the courts should take great care to maintain all of the protections afforded by this important law.

All of NCCR's twenty-four members, representing fifty-six of the nation's largest chain restaurant and food service concepts, maintain ERISA plans for the benefit of their employees. The Fourth Circuit decision at issue is not limited to affecting vacation pay plans, such as Denny's. NCCR's members maintain a broad range of ERISA plans that provide nationwide benefits to employees, including health insurance, disability insurance, severance pay, and retirement benefits. For many, these benefits are equally as important, if not more important, than the wages they receive from their employment relationship. Indeed, an employer's benefit package often represents the deciding factor in an employee's ultimate employment-related decision.

Employee benefits would be nearly without value if they were not secure and dependable. Accordingly, Congress placed numerous safe-guards on ERISA plans. From reporting and disclosure requirements (both to governmental agencies, and to participants and beneficiaries), to records retention, to anti-discrimination tests, to plan termination and restoration requirements—Congress went to great lengths to protect the integrity and value of ERISA plans for employees and beneficiaries. Of greater import is the enormous responsibility Congress placed on ERISA fiduciaries. ERISA imposes on these fiduciaries the highest standard of conduct required under our law. In articulating this standard of conduct, ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and

familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104. Fiduciaries who violate this standard of conduct may be subject to civil and even criminal penalties.

Recognizing this extremely high standard of conduct placed upon ERISA fiduciaries, and given the all-encompassing nature and national importance of the rights and protections provided, Congress established broad preemption provisions. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" with the exception of State laws which regulate insurance. 29 U.S.C. §§ 1144(a) and (b). Such preemption provides ERISA fiduciaries with confidence that their legal duties and responsibilities are satisfied if they comply with the numerous ERISA provisions. In addition, ERISA preemption reduces the costs of employee benefit plan administration by eliminating compliance with multiple state and local laws. This reduction in costs is critical to one of the primary objectives of ERISA, to encourage the formation of employee benefit plans. Finally, ERISA preemption also allows for national uniformity in employee benefit plan administration, which is extremely important for employers, like each of NCCR's members, who operate in multiple states.

ERISA's preemption protections apply to any employee welfare benefit plan or employee pension benefit plan established or maintained by a for-profit employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. §§ 1002 and 1003. Fiduciaries of these plans must have confidence in the protection of preemption. Congress provided a specific avenue to obtain such assurance, by expressly empowering fiduciaries to file civil actions in federal court. ERISA permits a civil action to be brought by a fiduciary "to enjoin any act or practice which violates any provision of [ERISA]

or the terms of the plan, or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of [ERISA] or the terms of the plan to obtain equitable relief to redress ERISA violations or enforce ERISA provisions." 29 U.S.C. § 1132(a)(3). Without this right, a fiduciary would be vulnerable to a state court deciding its plan is not covered by ERISA and/or the applicable state law is not preempted by ERISA, contemporaneous with a decision that its plan violates state law. The Fourth Circuit's decision at issue in this Petition has left fiduciaries defenseless to this one-two punch.

II. THE FOURTH CIRCUIT'S DECISION ERODES ERISA'S PREEMPTION AND EQUITABLE RELIEF PROVISIONS AND MAY THEREBY DISCOURAGE EMPLOYERS FROM CREATING UNIFORM EMPLOYEE BENEFIT PLANS.

The Fourth Circuit has held that the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, prohibits a federal court from issuing an injunction (or any declaratory relief that would potentially have a *res judicata* effect), sought pursuant to ERISA, related to a state court proceeding, even if that state court proceeding was initiated well *after* the injunctive or declaratory relief was sought in federal court. As Petitioners and other *amici* have surely noted, this holding severely restricts the effectiveness of ERISA's explicit empowerment to fiduciaries to obtain equitable relief in federal court. A conscientious fiduciary seeking to confirm its belief that a state law is preempted by ERISA will be thwarted simply by a party's filing suit in a state court any time before the federal court has ruled on the fiduciary's requested relief. This leaves the equitable protections and exclusive jurisdiction provided for by ERISA nearly meaningless.

If the Court denies Petitioners' petition and the divide among the Circuit Courts remains, fiduciaries will be left

vulnerable in many states to this unfair scenario. The fiduciary's best protection from a cause of action challenging its benefit plan under state law would be a ruling by the federal court that the plan is an "employee benefit plan" covered by ERISA and the state law is preempted by ERISA. However, in the states of the Fourth Circuit and others, a conveniently-timed state court action, even if filed well after the fiduciary exercises its rights under ERISA for equitable relief, divests the federal court's authority to make such a ruling. Such an inequitable result is contrary to the Congressional intent—and indeed, as argued by Petitioners, the statutory language—of ERISA and the AIA.

ERISA plans are complicated and expensive to administer. NCCR members cumulatively spend millions of dollars each year maintaining and administering their ERISA plans, which contain billions of dollars in assets. Such expenses include those associated with recordkeeping, annual reports, asset management, and benefit distribution. These expenditures are currently justified by the value of the ERISA benefits to the members' employees.

Eroding or eliminating the ERISA-provided protections of preemption and equitable relief will add considerable expense to employee plan administration. Without the ability to have a federal court declare that a state law is preempted by ERISA and/or enjoin an action attempting to enforce a state law preempted by ERISA, employers will incur significant amounts in litigation costs unnecessarily defending state court actions. Moreover, without the definitive ruling Congress empowered the federal courts to make that an employee benefit plan is a plan under ERISA and that a state law is preempted by ERISA, the forum jurisdiction may incorrectly rule that the plan is not covered by ERISA and the state law not preempted. Thus, in addition to litigation costs, employers may face substantial exposure to liability under preempted state laws. These additional and considerable

expenses may tip the scales in the cost-benefit analysis and dissuade employers from taking on the burdens of creating and administering an ERISA plan.

As this High Court has noted on several occasions, pension plan regulation is "exclusively a federal concern" and ERISA's preemption clause is "deliberately expansive." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987) (internal citations omitted). Moreover, the introductory statement in the statute itself states that ERISA's policy is to provide "ready access to the Federal courts." 29 U.S.C. § 1001(b). Finally, Congress provided the district courts of the United States with *exclusive* jurisdiction of civil actions brought by a fiduciary for the equitable relief made available by the statute. 29 U.S.C. § 1132(e). Thus, Congress unequivocally provided the federal courts with all of the authority for resolving issues regarding ERISA.

The Fourth Circuit's decision eliminates this federal jurisdiction in any instance where a litigant has filed suit in state court, be it before, after, or contemporaneous with a suit brought in federal court for equitable relief under ERISA. In such a case, the party arguing ERISA preemption is left only with the hope that the state court will make the appropriate ruling on the ERISA affirmative defense in the state court proceeding. If the state court does not, the defending party has no federal judicial recourse, save an ultimate and discretionary appellate review by this Court. This is clearly contrary to Congressional intent.

The most egregious of results from the Fourth Circuit's decision is indeed the Petitioners' predicament. If the decision remains, the Petitioners are forced to defend themselves in state court against a state agency in a proceeding involving state law, with ERISA's "ready access to the Federal courts" having been denied them. The Fourth Circuit has slashed an enormous hole in ERISA's safety net, and the Petitioners will fall through into this unfavorable position.

If ERISA fiduciaries are robbed of the protections afforded them in the statute, protections afforded in exchange for their extremely high duties of care and responsibilities, the balance between the duties and the protections is significantly disturbed. The consequence of the lopsided result is a disincentive for employers to continue to create and administer costly employee benefit plans, plans which are of significant value to employees throughout the country.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. ___

IN THE

Supreme Court of the United States

DENNY'S, INCORPORATED *et al.*,
Petitioners,

v.

CHUCK CAKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. ___

DENNY'S, INCORPORATED *et al.*,

Petitioners,

v.

CHUCK CAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, National Restaurant Association respectively moves for leave to file the attached brief *amicus curiae* in support of Petitioners. Petitioners have consented to the filing of the brief. However, this motion is made necessary because the Respondent has objected to filing of the attached brief *amicus curiae* by the National Restaurant Association.

The National Restaurant Association is the leading trade association for the food service industry representing over 315,000 food service providers. Many of those members have ERISA plans that apply uniformly to all of their employees

that work in several states, including California. This case involves the question whether the federal Anti-Injunction Act, 28 U.S.C. § 2283, may be used to preclude the uniform administration of an ERISA plan by a chain member restaurant to its restaurant units in several states, including California.

Since the question presented by the petition is of substantial importance to the National Restaurant Association members, the Association respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioners.

Respectfully submitted,

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QUESTIONS PRESENTED

Petitioners' petition presents the following questions for review:

1. Whether the U.S. Court of Appeals for the Fourth Circuit misinterpreted the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, when it held that the federal district court lacked authority to enjoin state proceedings commenced after Petitioners filed for injunctive relief in federal court.

2. Whether the Fourth Circuit misinterpreted the AIA and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, when it held that Petitioners' request for declaratory and injunctive relief was not "expressly authorized" under 28 U.S.C. § 2283.

3. Whether the Fourth Circuit erroneously ruled that all forms of declaratory relief, as requested by Petitioners, constituted an injunctive proceeding within the meaning of 28 U.S.C. § 2283.

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IN THE

Supreme Court of the United States

No. ___

DENNY'S, INCORPORATED *et al.*,
Petitioners,

v.

CHUCK CAKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Restaurant Association ("NRA") is the largest trade association representing restaurants in the United States.[1] Membership in the NRA includes over 315,000 foodservice establishments and restaurant units. Petitioner Denny's, Inc. represents itself in this proceeding as a national restaurant chain employing some 30,000 persons throughout several states, including California. Similar restaurant chain members (defined by the National Restaurant Association as

[1] Petitioners have consented to the filing of this brief. Respondent has not consented. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

a restaurant or foodservice establishment that owns or franchises with at least eight or more units operating in five or more states), with similar plans applicable to a chain member's employees nationwide in many states, including California, constitute approximately ten percent (10%) of NRA's total membership.

The restaurant industry employs an estimated 12 million workers, making it the largest private-sector employer in the United States. This industry provides work for nearly 9% of all persons employed in the United States. Restaurant industry sales in 2004 are forecast to equal 4% of the U.S. gross domestic product, with the overall economic impact of the restaurant industry expected in 2004 to exceed $1.2 trillion. *National Restaurant Association Restaurant Industry Pocket FactBook 2004.*

NRA chain members will be directly impacted by a ruling on the issues in this petition. Most chain member restaurants of the National Restaurant Association have various employment policies covered by ERISA, including policies covering vacation benefits, health benefits, retirement plans, etc. The issues presented by this petition and decision by this Court will impact similarly situated National Restaurant Association members.

SUMMARY OF ARGUMENT

Notwithstanding congressional intent under ERISA, 29 U.S.C. § 1144 (i.e., ERISA preempts state laws attempting to govern the terms of an ERISA plan), the Court of Appeals below denied Petitioners' declaratory and injunctive relief to prohibit California state proceedings to implement a state labor law requirement that would prevent uniform application of Petitioners' ERISA plan to employees in California. The U.S. Court of Appeals for the Fourth Circuit misinterpreted the Anti-Injunction Act when it ruled below, contrary to decisions of the U.S. Courts of Appeal for the First, Seventh and Eighth Circuits, that the federal district court lacked

authority to enjoin state court proceedings commenced *after* Petitioners initiated federal court action. The Court of Appeals also committed reversible error in holding, contrary to rulings of the U.S. Courts of Appeal for the Second and Sixth Circuits, that Petitioners' request for declaratory and injunctive relief in the district court was not "expressly authorized" within the meaning of 28 U.S.C § 2283. Finally, the Court of Appeals below erroneously ruled, in conflict with several other U.S. Courts of Appeal, that Petitioners' request for *declaratory relief* essentially constituted "an injunction to stay proceedings in a state court" within the meaning of the Anti-Injunction Act, 28 U.S.C. § 2283. Because each of these rulings was material in denying Petitioners' requests, and such rulings are in conflict with rulings by other Courts of Appeal, the petition should be granted.

ARGUMENT

I. THE QUESTION WHETHER 28 U.S.C. § 2283 APPLIES TO STATE COURT PROCEEDINGS COMMENCED AFTER INJUNCTIVE RELIEF IS FILED IN FEDERAL COURT NEEDS RESOLUTION

Petitioners institute uniform vacation plans subject to the Employee Recruitment Income Security Act ("ERISA") of 1974, 29 U.S.C. § 1001 et seq., nationwide to all Denny's restaurants in numerous states, including California. California Labor Code § 227.3 imposes requirements on employer policies concerning payment of employee vested vacation time upon employment termination. However, that state law provision conflicts with Petitioners' plan requirements. Petitioners filed for injunctive and declaratory relief in federal district court. Before the federal district court acted on the requested relief, however, the state of California sought in California state court imposition of state law requirements to Petitioners' Plan.

The Supreme Court has ruled that the federal Anti-Injunction Act, 28 U.S.C. § 2283 ("AIA"), does *not* bar injunctions against the commencement of state court proceedings. *See Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). That decision did not address, however, the precise issue where state proceedings are not pending until *after* the injunctive relief is requested in federal court, as presented by Petitioners.

A clear split among the U.S. Circuit Courts of Appeal exists on the issue. For example, in *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 884 (5th Cir. 1993), the U.S. Court of Appeals for the Fifth Circuit stated that "[a] circuit split exists on the question whether the [AIA] . . . appl[ies] where the injunction is sought before a state suit has been filed but is not issued until after [such filing] . . ." Similarly, the split was recognized by the U.S. Court of Appeals for the Second Circuit in *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F. 2d 58, 61 (2d Cir. 1990), and the Sixth Court in *Roth v. Bank of Commonwealth*, 583 F. 2d 527, 533 (6th Cir. 1978).

Because of this long-standing split among the lower courts that jeopardizes the uniform application of ERISA policies, particularly to Petitioners' policies and policies of similarly situated chain restaurant members of the National Restaurant Association that will be impacted by a ruling on the questions before this court, review should be granted.

II. THE COURTS OF APPEAL CONFLICT WHETHER ERISA IS A STATUTORILY AUTHORIZED EXCEPTION TO 28 U.S.C. § 2283

The federal Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, is inapplicable if the injunctive relief requested by Petitioners in the federal court below is "expressly authorized by Act of Congress." 28 U.S.C. § 2283. Five appellate courts have considered the issue presented by Petitioners whether

ERISA provides the express authorization within the meaning of 28 U.S.C. § 2283, with split results. Compare, *General Motors Corp. v. Buha*, 623 F. 2d 455 (6th Cir. 1980), and *Gilbert v. Burlington Industries*, 765 F. 2d 320 (2d Cir. 1985) with *Total Plan Services, Inc. v. Texas Retailers Ass'n, Inc.*, 925 F. 2d 142 (5th Cir. 1991). It is critical to NRA members with ERISA plans that uniformly apply to employees in restaurant outlets in several states that Petitioners' petition on this issue be reviewed in order to resolve the split among the Courts of Appeal. A ruling by this Court on the question presented for review could result in a uniform understanding of the circumstances in which federal adjudication of plan-related issues may occur.

III. THE COURT SHOULD RESOLVE WHETHER THE ANTI-INJUNCTION ACT PROHIBITS THE DECLARATORY RELIEF SOUGHT BY PETITIONERS

Petitioners sought declaratory relief that (1) the Denny's plan and trust constituted an employee welfare benefit plan under ERISA, and (2) a declaration that ERISA preempts California law to the extent that state law interferes with Petitioners uniform enforcement of its ERISA plan and trust. The Fourth Circuit below ruled that, notwithstanding the Anti-Injunction Act's limitation under 28 U.S.C. § 2283 to *injunctions*, "injunctions" also encompass the *declaratory relief* sought by Petitioners. The rationale for denying Petitioners' request was that declaratory relief supposedly would have the "same effect as an injunction."

This ruling conflicts with rulings of other U.S. Courts of Appeal, as pointed out in Petitioners' petition. To construe the AIA beyond the clear wording of the statute also appears contrary to the ruling of this Court in *Vendo Co. v. Lektro-Vend Corp.* 433 U.S. 623, 642 (1977), and prohibits Petitioners (and ERISA employee benefit plan sponsors, including NRA members) from even seeking a federal court

declaration of rights where applicable state law conflicts with, and is contrary to, congressional intent under ERISA. 29 U.S.C. §§ 1114, 1132(e); also see *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 26 (1983).

As recently stated by this Court in *R.B. Yates Profit Sharing Plan v. Hendon*, ___ U.S. ___, 124 S. Ct. 1330, 1341 (2004): "[A] goal of ERISA is to enable employers to establish a uniform administrative scheme . . ." Uniformity is impossible, however, if plans are subject to different legal obligations in different states. Such lack of uniformity impacts Petitioners', and similarly situated NRA members', ability to implement plans on a nationwide basis. This is contrary to the express intent of Congress under ERISA.

CONCLUSION

For the reason set forth above, and because the impact of such ruling extends far beyond the parties directly involved in this case, *amicus curiae*, the National Restaurant Association, respectfully requests that the Court grant Petitioners' request for a Writ of Certiorari.

Respectfully Submitted,

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